

THE NATURE, ASSESSMENT AND QUANTIFICATION OF MEDICAL EXPENSES AS A HEAD OF DELICTUAL DAMAGE(S)

by

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SUMMARY

Medical expenses refer to all medical and related expenditure reasonably incurred in respect of bodily injuries sustained. This then constitutes the primary loss in incidences of bodily injuries. However, it is accepted that bodily injuries infringe in the main the non-patrimonial aspects of the individual's bodily integrity which is a personality right. Notwithstanding this trite provision of our law, the dissertation contends that medical expenses as a head of damages is inherently patrimonial. In essence, the true nature of medical expenses as a loss that ultimately affects both the patrimonial and non-patrimonial interests of the individual, is considered.

Furthermore, the dissertation analyses the assessment and quantification mechanisms in our law, and makes a comparative study with the corresponding positions in England and Australia. The intended outcome of this dissertation is to provide clear guidelines for the award of damages, particularly where future loss is involved.

KEY TERMS

Collateral source rule

Interest as damages

Interest on damages

Mitigation of loss

Nature of medical expenses

Optimum medical benefits

Private law (subjective) rights

Reasonableness of expenses

Right to healthcare

Road Accident Fund Act 56 of 1996

Road Accident Benefit Scheme Bill 2013

ABBREVIATIONS

A	Appellate Division
All SA	All South African Law Reports
All ER	All England Reports
C	Cape Provincial Division
CA	Court of Appeal
CC	Constitutional Court
CILSA	Comparative International Law Journal of Southern Africa
Ck	Eastern Cape High Court, Bisho
CLR	Commonwealth Law Reports
CPD	Cape of Good Hope Provincial Division
D	Durban and Coast Local Division
DCP	Deputy Chief Justice
E/ECP	Eastern Cape High Court, Port Elizabeth
ELC	East London Circuit High Court
GSJ	Gauteng South High Court, Johannesburg
HL	House of Lords
HPCMP	Health Profession Council Ethical Tariff for Medical Practitioners
J	Judge
JA	Judge of Appeal
JOL	Judgments On Line
MBL	Modern Business Law
N	Natal Provincial Division

NHI	National Health Insurance
NHS	National Health Scheme
PER/PELJ	Potchefstroom Electronic Law Journal
SA	South African Law Reports (Juta)
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
SE	South Eastern Cape High Court
T	Transvaal Provincial Division
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
W	Witwatersrand Local Division

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Chapter 1: Introduction to the dissertation

1.1 Introduction

This dissertation has been compiled with a view to researching medical expenses as a head of damage and making recommendations that will lead to more certainty when assessing this head of damage, particularly where future loss is concerned. Based on the knowledge at hand, there has not been any in-depth post-graduate research conducted into this topic in South Africa.

1.2 Points of departure and exclusions

The object of damages in South African law is to put the claimant, as far as money makes it possible, in the same position as he/she would have been in if the damage-causing event had not occurred.¹ Thus, in essence, the aim is to grant the fullest possible compensation.²

Suffice it to say that there is a distinction in the assessment and quantification of past medical expenditure and future medical expenditure; the former refers to expenses already incurred as at the date of judgment or settlement, while the latter refers to probable expenditure reasonably expected to be incurred in the future.

On the one hand, past medical expenses may be said to be capable of precise arithmetic calculation, or at least may be estimated with a close approximation to accuracy. However, it needs to be considered whether inflation has an effect on the accurate assessment and quantification thereof.

On the other hand, future medical expenses appear to be incapable of mathematical precision because at the time of assessment of damage and quantification of damages, the loss would not have occurred. As a result, it is often necessary for the courts to make an 'informed guess'.³ In fact the courts seem rather fixated on making these 'informed

¹ Explained as *negative interesse* in Potgieter, Steynberg and Floyd *Law of Damages* 24 and in Joubert *LAWSA* 27. The phrase has also been used in judgments of the courts as is apparent in *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C) 174I-J and in *Singh and Another v Ebrahim* [2010] 3 All SA 187 (D) 192C-D.

² This is analogous with the method applied in England and Australia. See McGregor *Damages* 12-13; Luntz *Assessment of Damages* 5.

³ Potgieter, Steynberg and Floyd *Law of Damages* 139; *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C) 178I; *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) 546F-G; *Mutual & Federal Insurance v Ndebele* 1996 (3) SA 553 (A) 559H.

guesses', evidently neither desiring nor aspiring to certainty. This is summed up by Conradie JA:⁴

No matter how anxiously a court peered into the future when assessing future hospital or medical expense, or costs of goods and services, it risked awarding either too much or too little.

From the above statement it follows that it would not be feasible to embark on this dissertation in an attempt to establish a method of assessing medical expenses (both past and future) that delivers perfect compensation.⁵ Therefore, from the outset, it should be emphasised that the aim is rather to determine whether there exists in law, both locally and internationally, mechanisms that may point to a sound formula for assessing delictual damages for medical and related expenses that is capable of the fullest possible awards. Notwithstanding this, however, it should be borne in mind throughout that as far as probable future expenses are concerned, assessment takes place before realisation of the loss.

The legal terminology or phrases that make up the title of the dissertation shall be taken to mean the following, unless the context indicates otherwise:-

1.2.1 Nature of medical expenses – medical expenses relates to all medical and related expenditure reasonably incurred by the claimant in respect of bodily injuries sustained, and which is patrimonial in nature.

This shall include the following, but will not be limited thereto:-

- a) Accident rescue services (thus any ambulance or other paramedic services);
- b) Medical services (including doctors' consultations, pathology tests, medication, etc.);
- c) Hospital and nursing services (including day clinics);
- d) Disability services (including wheelchairs, crutches, oxygen tanks, brail services, hearing devices, etc.);
- e) Rehabilitation services (including step-down facilities, physiotherapy, etc.);
- f) Transport costs of the claimant and those whose visits are necessary to aid the claimant's rehabilitation;

⁴ *Road Accident Fund v Arendse NO* 2003 (2) SA 490 (SCA) 494B.

⁵ Dixon J sums it up in *Lee Transport Co Ltd v Watson* 1940 64 CLR 13 – 14: "No doubt it is right to remember that the purpose of damages for personal injuries is not to give a perfect compensation in money for personal suffering. Bodily injury and pain and suffering are not the subject of commercial dealing and cannot be calculated like some forms of damage in terms of money."

- g) Adaptations to the house, motor vehicle and the like to accommodate the injuries or disability of the claimant.

Medical expenses refer to both past and future expenditure. However, the **nature of medical expenses as a head of damage goes beyond the assessment of loss and actually communicates to the origin of the loss.** As will be seen in 2.3 below, loss of a medical nature actually emanates from the infringement of both the non-patrimonial and patrimonial interests of an individual's person.

1.2.2 Assessment of medical expenses - shall refer to the measurement of the extent of damage or loss of a medical nature emanating from bodily injuries.

1.2.3 Quantification of medical expenses – shall refer to the final calculation of the award or damages to be granted to the claimant for the loss assessed as mentioned in 1.2.2 above.

1.2.4 Heads of damage(s)⁶ – head of damage shall refer to all those heads under which delictual damages could be claimed, including but not limited to the following:

- a) Medical expenses;
- b) Loss of support;
- c) Past loss of income;
- d) Loss of earning capacity;
- e) Pain and suffering;
- f) Loss of amenities of life;
- g) Funeral and cremation costs.

Head of damages refers to the category of compensation awarded for the loss associated with that specific head of damage.

1.2.5 Delictual (delict)⁷- shall refer to wrongful and culpable conduct that creates a loss or aggravates an existing position.⁸

⁶ According to Potgieter, Steynberg and Floyd *Law of Damages* 20, damage can be defined as the diminution, as a result of a damage-causing event, of the utility or quality of a patrimonial interest in satisfying the legally recognised needs of the person involved.

⁷ E.g. (limited to those giving rise to bodily injuries) (i) Y is involved in a motor vehicle collision through X's conduct and breaks his leg; (ii) Y, an employee at ABC (Pty) Ltd, is injured by a malfunctioning elevator during the course and scope of his employment; (iii) Y contracts a lung disease because of inhalation of asbestos in the mines of DXZ Ltd; (iv) Z is rendered disabled due to medical negligence.

⁸ E.g. where Y, already receiving medical attention for a back injury, is injured in a motor vehicle collision as a result of which his back injury is aggravated and the need for an operation is accelerated.

This dissertation is not intended to cover all of the law of delict. In essence, the gist hereof shall be the assessment and quantification of damage(s), specifically medical expenses as a head of damage. As a result, no attempt shall be made to discuss the various elements of a delict.⁹ Suffice it to say that examples of delict will be provided to place the assessment of medical expenses in context; however, the discussion will not go beyond mere explanatory notes. Furthermore, it must be noted that the study will be limited to patrimonial loss, suffered due to bodily injuries in the form of past and future medical expenses. Therefore, no consideration shall be given to the assessment of awards for pain and suffering and/or non-patrimonial damage in general.

1.3 Problem statement

Medical expenses is an established head of damage in the law of delictual damages, alongside the familiar loss of earning capacity, loss of support, and loss of amenities of life. Notwithstanding this, medical expenses as a head of damage have not received the same amount of attention by distinguished authors¹⁰ in the law of damages that these other listed heads of damage have. In essence, there is a dearth of post-graduate studies on the assessment and quantification of this head of damage.

With this in mind, the dissertation is an attempt to research and make recommendations in respect of the following potential problems relating to the nature and assessment of delictual claims for medical expenses:-

1.3.1 Nature of medical expenses in light of the fact that bodily injuries cause the loss to be suffered

It is to be established whether medical expenses infringe upon any existing private law (subjective) right. Thus, it is to be ascertained whether the existing private law (subjective) rights are flexible enough to accommodate bodily injuries giving rise to patrimonial damage, or whether the law needs to be developed to accommodate the infringement of a personality right giving rise to patrimonial loss. It is worth noting that this dilemma is yet to be completely resolved either in jurisprudence or in practice.¹¹

⁹ Conduct, wrongfulness, fault, causation and damage.

¹⁰ Potgieter, Steynberg and Floyd *Law of Damages*; Boberg "The quantum of damages for personal injuries" 1960 *SALJ* 272; Luntz *Assessment of Damages*; McGregor *McGregor on Damages*; etc.

¹¹ Neethling "Personality rights: a comparative overview" (2005) 39 *CILSA* 225; Visser "Enkele gedagtes oor die uitbreiding van die vermoënsbegrip in die skadevergoedingsreg" 2003 *THRHR* 652.

1.3.2 Recognition of medical expenses as a head of damage where free and state-funded medical services are available

In addressing the above problem, the following legal questions will be answered:-

1.3.2.1 Does the claimant suffer any actual loss?

If the claimant receives free medical services in place of past medical and related treatment, and the probability exists that the same free medical services will be available for his/her future needs, the question to be asked is whether the claimant suffers any actual loss? It is a trite principle that the claimant must not be compensated twice for a single damage-causing event. However, it is held that the wrongdoer should not escape liability by reason that the claimant has been 'insured against the deed.'¹² In essence, how does one strike a balance between these two conflicting principles, and what effect does this have on the assessment and quantification of medical expenses as a head of damage, especially in light of possible free medical services?

1.3.2.2 Effect of private medical insurance (so called medical aid) and private medical treatment on the assessment of the damage

If the claimant made use of private medical insurance to pay for the past medical and hospital expenses, does the claimant suffer any loss? Does the fact that the claimant is a person of capital resources mean that assessment has to be altered to meet his/her living conditions, as long as the expenses are reasonably incurred? Does the indigent claimant have to contend with the lower quality of public medical services? The admissions¹³ of inadequacy in public service hospitals for serious medical cases (i.e. paraplegics, quadriplegics and the like) add to the dilemma of public vs. private health services as far as assessment and quantification are concerned.

1.3.3 Effect of social security legislation¹⁴ on the assessment of medical expenses

Claims for personal injuries giving rise to damage or loss have received the attention of the legislature. This dissertation will deal only with the Road Accident Fund Act 56 of 1996 (as amended) as an example of social security legislation that has had a huge influence on the assessment of medical expenses as a head of loss.

¹² See Potgieter, Steynberg and Floyd *Law of Damages* 233.

¹³ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) 435 para [95] F – I.

¹⁴ The following Acts fall into this category:- Compensation for Occupational Injuries and Diseases Act 130 of 1993, Road Accident Fund Act 56 of 1996 and Road Accident Fund Amendment Act 19 of 2005, Occupational Diseases in Mines and Works Act 78 of 1973, Social Assistance Act 13 of 2004, etc.

The following problem areas, in respect of medical expenses, will be researched and possible solutions provided:-

1.3.3.1 The practical value of the undertaking¹⁵ in terms of Act 56 of 1996

Who benefits from the giving of an undertaking? Is it only to the benefit of the Road Accident Fund by delaying payment, or is there also a benefit in it for the claimant? How does giving an undertaking affect the nature of medical expenses and the common law principles of quantifying future damages?

Medical tariffs¹⁶ as prescribed by the Minister of Health will be evaluated to determine their effect on the assessment and quantification of medical expenses, especially where an undertaking is given.

1.3.3.2 The impact of section 21 of Act 56 of 1996 on the principle of full compensation

The rationale and consequences of the abolition of the common law action against the wrongdoer, as it impacts on the claim for medical expenses, will be investigated.

In *Archibald v Attorney-General*¹⁷ the Canadian Court of Appeal held per Amissah P:

In an area of judicial determination which involves a projection into the unknown future, it would be a bald man who could say that one method is infallibly the only way of arriving at a just answer in any particular country.

1.4 Comparative study

Embarking on a comparative study of the laws of England and Australia is necessary for the following reasons:-

1.4.1 England

The fact that the English law of procedure has influenced our law of procedure is by now a moot point. Having noted this, a comparison will be made of the substantive law in respect of the law of damages in order to determine whether there have been valuable developments in English law where medical expenses are concerned.

¹⁵ S 17(4)(a) of Act 56 of 1996.

¹⁶ S 17(4B)(a) of Act 56 of 1996.

¹⁷ 1991 BLR 169 (CA) 170.

Consideration will be given to section 2(4) of the Law Reform (Personal Injuries) Act of 1948¹⁸ concerning the question of private medical facilities vs. public medical facilities. The emphasis falls not on which of the two was used by the claimant, but rather on whether the expenditure was reasonably incurred. In any event, the claimant does not necessarily recover in damages every cent expended, but rather only those costs that were reasonably incurred.

The following questions therefore merit some answers:-

- a) Does the distinction between private and public medical health matter in the assessment of medical expenses as a head of damage?
- b) What effect, if any, does section 2(4) have on the assessment of damage and quantification of damages?
- c) Are there guiding principles whereby 'reasonableness of expenses' is measured?
- d) Which contingencies are taken into account in discounting the award for future medical expenses?

The English legal system proceeds from the premise that the award of damages ought to be invested by the claimant as it is assumed that individuals have the intelligence of an average stock broker.¹⁹ This assumption and its subsequent result have the adverse effect that it compromises the principle that neither the court nor the wrongdoer should decide how the award of compensation is to be used.²⁰ The effect hereof and its resultant consequences on the lump sum award, especially where the amount is not actually invested, will be researched.

- e) Can actuarial evidence bring the much desired redress in the assessment and quantification of medical expenses?

Regarding the established system of using the multiplier²¹ and the multiplicand²² in the assessment of future expenses over the evidence of the actuary, what effect does this practice have on the final award?

¹⁸ S 2(4) of Act of 1948: "In an action for damages for personal injuries... there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or a part of them by taking advantage of facilities available under the National Health Service Act 1977."

¹⁹ Markesinis et al. *Compensation for Personal Injury* 119.

²⁰ *Ibid* 116.

²¹ Figure that represents the number of years taken as the period of loss. See Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 988. See also McGregor *McGregor on Damages* 1422.

²² The annual figure representing each head of loss - thus the present value of the service rendered or the loss suffered. See Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 988. See also McGregor *McGregor on Damages* 1422.

- f) Does inflation have a role to play in the quantification of damages for medical expenses?

1.4.2 Australia

Australian law also relies heavily on the English legal system. Despite some similarities, the Australian system is at a more advanced stage of development than South African law. In essence, this dissertation will attempt to gauge how our law of damages differs from Australian law of damages.

An argument can be discerned that the adoption and application of the needs principle in Australian jurisprudence is probably its greatest legal discovery in cases where medical and related expenses are the head of damage. Much of the emphasis, as shall be demonstrated in Chapter 4, falls not on the legalistic or scientific application of methods external to claimants but rather on the medical needs of the particular claimants. The value and practicability of this approach will be determined with particular attention being given to the assessment of damage. A further inquiry will be made into the value of services provided, and whether the solutions offered are legally and practically sound.

As is the position in English law, the role of the legislature in attempting to arrive at certainty regarding probable future loss will be considered. Regard here will be given to periodical awards as a legislative alternative to the lump sum awards, which is the premise from which awards proceed.

1.5 Purpose of the study

The primary objective of this dissertation is to analyse, research and make recommendations in respect of the assessment and quantification of medical expenses as a head of damage(s) (particularly where future expenses are concerned). The process of assessment and quantification of medical expenses will be assisted by first defining the nature of medical expenses as a head of damage, and then establishing the effect of free and state-funded medical services as well as private medical insurance thereon.

The principles that will guide this process include the following:

- once-and-for-all rule
- compensating advantages

- mitigation of loss
- interest and inflation
- apportionment of damages due to contributory fault
- statutory limitations²³
- discounting

An ancillary consideration will be whether the victim's common law right to sue the wrongdoer for damage can co-exist with the protective measures provided by social security Acts in general.

1.6 Research methodology

This study will mainly focus on a literature study of legislation, case law, books and periodical articles. It should be noted that the study undertaken in this dissertation is not in any way of an empirical nature; therefore, the focus is on qualitative research. A critical analysis of the South African law will be made, along with a comparative study of the corresponding principles in England and Australia.

²³ E.g. s 17(4B)(a) of Act 56 of 1996.

Chapter 2: South African law

2.1 Introduction

We have all been affected by bodily injuries in one way or another; either directly when we personally suffer an infringement of our bodily integrity, or indirectly when our dependant incurs bodily injuries. Medical expenses have been defined as all medical and related expenditure reasonably incurred in respect of bodily injuries sustained.²⁴ The attendant primary loss in most incidences of bodily injuries is medical expenses.²⁵ Notwithstanding this, it is in the first place the victim's bodily integrity, which forms part of a person's personality rights, that is infringed by the bodily injuries.²⁶ However, the primary loss suffered in the form of medical expenses is patrimonial in character, whereas personality rights safeguard personality interests that are non-patrimonial in making. Thus, from the violation of a person's bodily integrity, which is a recognised personality right, damage of a patrimonial character could follow, apart from the obvious personality interest that is infringed. This dissertation endeavours to arrive at a theoretical explanation for this enigmatic phenomenon. Thus, a thorough study of the existing private law (subjective) rights will be undertaken to establish the nature of medical expenses in light of the fact that bodily injuries cause this loss to be suffered.

In endeavouring to determine the nature of medical expenses, this dissertation will also consider the constitutional right to healthcare, possible contractual obligations, and the statutory ramifications in respect thereto. The issue of categorisation of this head of loss and whether future claims may be brought under this head will be analysed in view of the impending implementation of the National Health Insurance scheme (NHI).

Of relevance to the investigation of damages for medical expenses is the general object of an award of damages, which is further complicated by the promulgation of social legislation with independent objects or goals. The impact of these sometimes divergent objects or goals will be discussed within the South African context.

The facet of the reasonableness test within the concept of medical and related expenses will fall to be discussed and contextualised for current purposes. A thorough distinction will be

²⁴ Potgieter, Steynberg and Floyd *Law of Damages* 456.

²⁵ An exception could be where a person dies at the scene of the accident, in which case funeral expenses would be the primary loss suffered.

²⁶ Neethling, Potgieter and Visser *Law of Personality* 25.

drawn between the assessment of past medical and related expenses, and probable future medical and related expenses. In the final quantification of medical and related expenses, the legal aspects of interest on damages and inflation will be looked into, with particular emphasis on the aspect of currency nominalism. Furthermore, a short summary of collateral benefits relevant to medical expenses will be provided.

2.2 Infringement of bodily integrity and the loss suffered

2.2.1 Introduction

The accepted norm in this dissertation and elsewhere in the law of damages²⁷ is that bodily injuries infringe in the first place the victim's bodily integrity, which forms part of a person's personality rights. As indicated in 2.1 above, the loss so suffered in the form of medical expenses is patrimonial in character, notwithstanding the personality interest from which it emanates. It follows that an investigation into the well-known private law (subjective) rights ought to be undertaken to determine the true nature of medical expenses as a patrimonial loss that is affected by a person's inherently non-patrimonial personality interest in the form of bodily integrity.

2.2.2 The issue of categorisation of rights

There are essentially four classes of private law (subjective) rights currently recognised in our law.²⁸ A person's bodily integrity, relevant for this study, falls into the category of personality rights.²⁹ These personality rights have been said to aim at the recognition of a person as a physical, spiritual and moral being, and as such they guarantee the enjoyment of a person's own sense of existence.³⁰ They have been held to have the following characteristics:³¹

- a) they are private rights;
- b) of a non-patrimonial nature;
- c) connected to the personality of the holder, therefore highly personal;
- d) non-transferable and uninheritable; and
- e) commence at birth and terminate on the death of the holder.

²⁷ Neethling, Potgieter and Visser *Law of Personality* 25.

²⁸ Real rights, intellectual property rights, personality rights and personal rights. See Du Plessis *Introduction to Law* 142 – 145; Neethling "Persoonlike immaterieelgoedereregte: 'n nuwe kategorie subjektiewe regte?" 1987 *THRHR* 316.

²⁹ Neethling, Potgieter and Visser *Law of Personality* 25.

³⁰ Neethling 2005 *CILSA* 210 at 210.

³¹ Neethling, Potgieter and Visser *Law of Personality* 13.

The accepted and express provision in b) above is indicative of a *prima facie* conclusion that non-patrimonial loss is the feasible loss that emanates from any infringement whatsoever of personality rights by the wrongful act of another. This follows from the fact that personality rights protect personality interests³² that have a non-patrimonial character.³³ However, notwithstanding the non-patrimonial character of personality rights in general, medical expenses that emanate from the bodily injuries sustained have a patrimonial character. It therefore follows that an infringement of a personality right is not incapable of resulting in patrimonial loss.

It must, however, be noted that the traditional distinction in the private law (subjective) rights makes it difficult to reconcile the patrimonial consequences of an infringement of the bodily integrity with the inherently non-patrimonial content of a personality right and/or interest. Thus, any conformation of this contradiction of characteristics to the existing private law (subjective) rights is not without a fair share of theoretical difficulties.

Firstly, whereas on the one hand, loss incurred by the infringement of personality rights is compensable by awarding satisfaction³⁴ and in general claimed with the *actio iniuriarum*, damage of a medical nature, on the other hand, is claimable with the *actio legis Aquiliae* and compensation³⁵ is awarded.³⁶ It should be clear that satisfaction falls outside the ambit of this head of damage in that the damages awarded for medical and related expenses cannot be said to serve as consolation, but rather serve to restore the balance of a decrease in the patrimony³⁷ of the claimant.³⁸

³² E.g. dignity, good name, bodily integrity, etc. According to Joubert 1958 *THRHR* 98 (translation in *Law of Personality* 12), personality interests refer to those [non-patrimonial] legal objects that are inseparably bound up with the personality of the holder of the right.

³³ Neethling, Potgieter and Visser *Law of Personality* 13.

³⁴ It is defined in Potgieter, Steynberg and Floyd *Law of Damages* 22 as the reparation of a wrong or the giving of *solatium* for someone's feelings of outrage or having to endure an injustice. This implies the reparation of damage in the form of injury to personality by *inter alia* effecting retribution for the wrong suffered by the plaintiff and by satisfying the plaintiff and/or the community's sense of justice.

³⁵ Potgieter, Steynberg and Floyd *Law of Damages* 2 define compensation in a general sense as the process of reparation of any patrimonial or non-patrimonial loss. However, here it refers to patrimonial loss only.

³⁶ Neethling, Potgieter and Visser *Law of Personality* 39.

³⁷ Potgieter, Steynberg and Floyd *Law of Damages* 52 define patrimony as all subjective rights with a **monetary value** as well as expectations of acquiring such rights. In a factual and economic sense it consists of everything (material objects, rights or factual possibilities) of an individual that has a **monetary value** and that may be used by him or her in satisfying his/her legally recognised needs (my emphasis).

³⁸ The view expressed in Potgieter, Steynberg and Floyd *Laws of Damages* 45 that "[t]he law does not, for example, give compensation in respect of non-patrimonial loss associated with damage to property, and neither should patrimonial loss be acknowledged in the case of an infringement of a personality right, since this relates to patrimonial interests which should be recognised as such", is supported.

Secondly, it further appears to be the accepted norm in our law that personality rights protect the infringement of personality interests and that patrimonial loss arises only where a patrimonial interest is infringed.³⁹ It therefore comes as no surprise that Neethling⁴⁰ states in this regard that it is an enigma that patrimonial loss can exist without an element of patrimony being involved.⁴¹

It cannot be emphasised enough that bodily integrity is an established component of personality rights since our law has, for some time now, recognised it as such.⁴² It is perhaps not an over-statement of fact to suggest that, along with dignity, bodily integrity is probably the primary component of personality rights. Therefore, what requires clarification in this respect is the relationship, if any, between the loss, that is, medical expenses accruing on account of bodily injuries, and the patrimonial interests of the claimant.

There is no gainsaying that bodily integrity cannot and ought not to be valued in monetary units as it is not the subject of any commercial dealing.⁴³ Notwithstanding this, however, one cannot deny that capital is a material object in one's patrimony. As a result, it therefore follows that the incurring of medical expenses, owing to an infringement of the bodily integrity and the subsequent settlement by capital, disturbs the patrimonial harmony of the claimant's patrimonial interest, and that constitutes damage. Thus, the utility of a patrimonial interest is diminished by the payment of medical expenses resulting from the infringement of a personality right.⁴⁴

In conclusion, one can state that the "right" so infringed when medical expenses are incurred has consequences and characteristics different from those of personality rights, and therefore it cannot be said that its nature and content fall within the ambit of personality rights *strictu sensu*. Thus, the common parlance idiom that in order to make money we lose our health, and then to restore our health we lose our money, creates a simplistic relationship between bodily integrity and a person's patrimonial interest. However, given that the legal, factual and economic meaning of patrimony is stated in such

³⁹ Neethling 2005 *CILSA* 210 at 224 and Potgieter, Steynberg & Floyd *Law of Damages* 36 - 38.

⁴⁰ 2005 *CILSA* 210 at 224.

⁴¹ In reference to medical expenses as a patrimonial loss incurred on account of bodily injuries, as an integral part of personality rights. See Neethling 2005 *CILSA* 210 at 224.

⁴² See Neethling, Potgieter and Visser *Law of Personality* 3.

⁴³ In *Geldenhuys v Minister of Safety and Security and Another* 2002 (4) SA 719 (C) 736C-E, the court cited with approval the following statement made in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194: "[I]t must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty...."

⁴⁴ Potgieter, Steynberg and Floyd *Law of Damages* 20.

a manner that it refers only to material assets⁴⁵ or everything with a **monetary value** in a person's estate, the probability that there exists in law a relationship between the inherently non-patrimonial interest in bodily integrity and the typically patrimonial interest of medical expenses, so as to conform to traditional personality rights, seems remote.

Furthermore, the following characteristics of medical expenses make this head of loss less compatible with the general purport of personality rights:⁴⁶

- a) the loss can be directly measured in money, a fact that does not find favour with the nature of personality rights in that these legal objects are inseparably bound up with the personality of their holder and are not the subject of commercial dealing, and therefore cannot be arithmetically measured ; and
- b) the extent of the loss can be determined with greater precision; however, at present this only holds true for past medical expenses as the calculation of future expenses involves a lot of uncertainty and speculation.

It is apparent that there exists an irreconcilable difference between medical expenses as a head of loss and other losses caused by the infringement of bodily integrity, such as pain and suffering. It is therefore necessary to consider the true nature of medical expenses.

2.3 Nature of medical expenses

When capital is used to restore the bodily integrity of an individual after a delict, such a state of affairs or factual reality reduces the patrimony of the claimant. However, this in no way suggests that personality rights may have an implicit patrimonial content but it is rather an acknowledgement of the dilemma we are faced with currently. In this regard and having considered the conflict between medical expenses as a head of damage and the content of personality rights, it suffices to conclude that it would be assigning the true nature of personality rights to the theoretical wilderness if one were to categorise medical expenses as a head of loss that emanates from the infringement of both the bodily integrity and patrimony of the 'victim' of the delict under this private law (subjective) right. In effect, the theoretical analysis of private law (subjective) rights, specifically personality rights, and its relation to this head of loss creates theoretical difficulties in instances where one damage-causing event infringes the patrimony and the personality rights and/or interests of the claimant.

⁴⁵ Immovables such as land, a house, etc., and movables such as a motor vehicle, household furniture, etc.

⁴⁶ Potgieter, Steynberg and Floyd *Law of Damages* 37.

To resolve this dilemma, it ought to be determined whether there is a need to develop a new category of private law (subjective) rights to cater for this and other similarly defined areas. In doing so, the traditional approach to the concept of rights as set out by authors Hosten et al.⁴⁷ and Du Plessis⁴⁸ should be taken into account. According to this approach, a relationship must exist between a legal subject and a legal object, and also a relationship between the legal subject and other legal subjects.⁴⁹

If it is not, or not only, the right to bodily integrity that is being infringed by bodily injuries, it is necessary to identify another right that is (simultaneously) infringed by one and the same damage-causing event. To be theoretically sound, the legal object involved should also be identified. It is suggested that the specific right so infringed when bodily injuries are suffered could be identified as not only the right to bodily integrity (personality right), but also the *right to healthcare*. Apart from the contention made here that the right to healthcare has to be recognised as a subjective right for purposes of common law liability, the right to health is also an entrenched fundamental right,⁵⁰ although protected in various other more specific ways in practice. The recognition of the right to health within the South African legal jurisprudence needs to be analysed and its different manifestations identified.

2.3.1 Right to healthcare as a subjective right

To qualify as a private law (subjective) right, the legal interest and/or object of the right to healthcare must satisfy the two-fold enquiry mentioned above.⁵¹ Furthermore, it must be determined whether the object of the right to healthcare meets the two requirements relevant for the recognition of private law (subjective) rights, namely the legal object must be of some use or value to the legal subject, and the legal object itself must have a sufficient measure of distinctness, definiteness and independence so that disposal and enjoyment thereof is possible.⁵²

⁴⁷ *Legal Theory* 543-544.

⁴⁸ *Introduction to Law* 140.

⁴⁹ Du Plessis *Introduction to Legal Theory* 143 defines personality rights as a legally supported claim of a legal subject to an aspect of his personality, which entitles the legal subject to certain powers regarding that aspect of personality, on the one hand, and a relationship between the legal subject and third parties, which legally obliges third parties to respect the former's claim to the aspect of his personality, on the other hand. The above definition demonstrates the practical application of the requirement for the determination of a private law (subjective) right. Simply put, it perfectly illustrates the subject-object and subject-subject relationships within the definition of a right.

⁵⁰ In terms of s 27 of the Constitution of the Republic of South Africa, 1996.

⁵¹ That there must be a relationship between the legal subject and the object of the right, on the one hand, and there must be a relationship between the legal subject and third parties, on the other hand.

⁵² Neethling, Potgieter and Visser *Law of Personality* 12.

a) Subject-object relationship

As with every right, the legal subject is the premise from which any probable relationship proceeds. The object of the right to healthcare is suggested to be the sound physical and mental wellbeing of the legal subject. It can be said that the healthcare needs of the legal subject safeguard the personal interest of the legal subject in his or her own physical and mental wellbeing, and as such should be recognised as a right to healthcare. In cases of bodily injury, the victim suffers detrimental personal consequences due to the injury to his/her bodily integrity in the form of loss of health.⁵³ It therefore follows that there is a supported claim of a legal subject to ensure that his/her health remains intact, and to have various more specific powers in respect of the object of his/her right to healthcare. Thus, to ensure sound physical and mental wellbeing, the legal subject may take measures ranging from medical insurance to treatment where an infringement is visited upon his/her person. In this way, one can logically conclude that this act satisfies the subject-object relationship and ensures that the legal subject enjoys powers over the object of his/her right.

b) Subject-subject relationship

An important consideration of the law is that every right created inevitably manifests a relationship between legal subjects. Thus, a right in respect of a legal object is only claimable as against other legal subjects on whom rests a duty to respect the owner's right to the legal object and not to infringe this right.⁵⁴ Thus, third parties⁵⁵ are duty bound to respect the healthcare right of the legal subject over his/her physical and mental wellbeing.

c) Use or value of the legal object to the legal subject

The legal object must be of *use* or *value* to the legal subject so as to satisfy the needs of the holder.⁵⁶ The healthcare needs of the legal subject, as an embodiment of the personal interest in sound physical and mental wellbeing, is already established as being of use to the legal subject, and the appreciable amount of value humans attach to their bodies has already been recognised.⁵⁷

⁵³ See Klopper *Third Party Compensation* 137.

⁵⁴ Hosten et al. *Legal Theory* 544.

⁵⁵ Including the state - s 27(2) of the Constitution of the Republic of South Africa, 1996 compels the state to honour this right. See 2.3.1 above.

⁵⁶ Neethling, Potgieter and Visser *Law of Personality* 12.

⁵⁷ *Ibid.*

d) Sufficient measure of distinctness, definiteness and independence

According to Neethling, Potgieter and Visser,⁵⁸ the recognition of a legal object displaying these characteristics is necessary to enable the holder to dispose of and enjoy the rights and powers of ownership and/or control over the legal object.⁵⁹ The question thus arises as to whether the personal interest one has in his/her sound physical and mental wellbeing has the above-mentioned characteristics as an element encompassing the healthcare of the holder.

An ancillary question to the main one, as expressed above, is whether the object of the right to healthcare can exist without the personality right and interest of the legal subject's bodily integrity? A correct answer here would be in the negative. This flows from the fact that the sound physical and mental wellbeing of an individual presupposes that the legal subject has the right to bodily integrity which, as should be clear at this stage of our law, is a recognised personality right.

If one accepts that the object of the right to healthcare is perhaps dependent upon the right of the individual's personality right to bodily integrity, would it not put the inquiry in this regard to bed? Put differently, would the apparent lack of distinctiveness, definiteness and independence perhaps suggest that the object of the right to healthcare is incapable of satisfying this requirement? This follow-up question does not necessarily lend itself to an obvious affirmative or negative response. However, one thing that the above exposition demonstrates is the uniqueness of the right this dissertation seeks to determine. The personal interest of an individual in his/her sound physical and mental wellbeing, as an object of the right to healthcare, has characteristics that are not at all common and may not easily lend itself to clear theoretical guidelines.

It is an undeniable fact in our law that bodily integrity is a form of personality right, and that the right is inherently non-patrimonial in nature. It is a distinct, definite and independent element of human existence in whatever shape or form. However, notwithstanding this, it is open to argument that the full complement of the right to bodily integrity requires the enjoyment of sound physical and mental wellbeing, which is the object of the right to healthcare, as stated throughout this dissertation. An absurd meaning should not be assigned to the statement immediately made, as people who suffer from any physical or mental deficiency require around-the-clock maintenance and that calls for more stringent measures to be taken in upholding the healthcare needs of the person involved. The

⁵⁸ Neethling, Potgieter and Visser *Law of Personality* 12.

⁵⁹ However, regard must be had to the remarks in Hosten et al. *Legal Theory* 544 that one cannot have ownership over a person's own body. It can be added that the body is not a commercial tool.

interrelatedness of a personality right to bodily integrity and the object of the right to healthcare makes for too compelling a case to simply ignore. Thus, one cannot rationally think away the one without the other simultaneously disappearing or remaining a bare right.

Bodily integrity alone, notwithstanding the established recognition thereof, cannot be said to be a justiciable right without giving it either a theoretical or legal meaning. Simply put, litigation in this area of the law precedes from some form of infirmity or another. For this reason, it can be argued that the right and interest an individual has in his/her bodily integrity assumes a certain degree of physical, mental, and to some extent moral, wellbeing. In essence, any individual claimant who wishes to claim compensation for an infringement of his/her bodily integrity would proceed from the notion that his/her wellbeing is tampered with in some respect or another. In this way, the infringement of the rights and/or interests a legal subject has in his/her bodily integrity is intrinsically linked to the object of the right to healthcare. Thus, the sound physical, mental, and to some extent moral, wellbeing of the legal subject in relation to his/her bodily integrity also happens to be the object of the right to healthcare, and this has been established as satisfying the requirements for distinctiveness, definiteness and independence and therefore passes the collective requirements for recognition of a private law (subjective) right.

The above relationship between the rights and/or interests a legal subject has over his/her bodily integrity and the object of the right to healthcare should not lull one into the belief that the two rights are the same or too similar for one to be recognised as a private law (subjective) right on its own. A broader interpretation of the nature of the healthcare right of the person indicates that it is a distinguishable right not falling swiftly within the traditional ambit of personality rights. A healthcare need is inherently patrimonial in nature, in that it entails financial implications for the party concerned. The financial standing of the holder of the right should be irrelevant in determining the value that is attached to this right, in that the government's fiscal authorities make a budget available to public sector establishments for the provision of healthcare facilities⁶⁰ while a minority of the population is on medical aid.⁶¹

In essence, although the bodily integrity of the person ought not to be commercialised, the elements that give meaning to this right are and ought to be valued in money. An argument can be made that the inherent patrimonial nature of the right to healthcare makes it distinct from all other non-patrimonial facets of the personality rights and/or interests.

⁶⁰ It is not relevant here whether public sector establishments adequately make the enjoyment of this right possible.

⁶¹ See further in 2.3.1 above.

Furthermore, it has to be noted that this right to one's healthcare interests is not similar to the forbidden theory of ownership over one's body.⁶² Thus, although the right is primarily aimed at safeguarding the bodily integrity of an individual (which cannot be subjected to ownership), it has to be noted that the right is external to individuals, and therefore maintains a marked level of definiteness and independence.

The right to healthcare is fundamentally patrimonial and any attempt to force conformation with the non-patrimonial nature of personality rights would tend to alter the latter's general character. The bodily integrity of the holder is the premise from which this right flows; there can be no claim to the right to healthcare if one does not suffer from some kind of infirmity, whether natural or caused by personal injury. In simple terms, one could state that the right is inseparably bound to the person of the holder of the right to bodily integrity.

The interconnectedness of the bodily integrity, a personality right, as the right that is ultimately infringed and the healthcare right of the holder, inherently patrimonial, cannot be emphasised enough. Thus, the right so infringed is *personal* in that the bodily integrity remains an inseparable element of the person of the holder of the right; it is, however, *material property* in that the healthcare right of the holder has financial implications irrespective of the diversity of the subsequent assessment. That is, the patrimony of the holder of the right falls to be diminished by the settlement of medical expenses incurred as a result of the infringement of bodily integrity.

In line with these characteristics, a new category of private law (subjective) rights, namely **personal material property rights**,⁶³ has been suggested. This category is intended to cover, among other things, instances of medical expenses flowing from personal injury. By recognising this new category of subjective rights, an infringement of the right to healthcare can easily be identified as wrongful, and the consequences of such an infringement, namely medical expenses, can be claimed from the wrongdoer as causally connected to the damage-causing event. This explanation places an infringement of the bodily integrity and resultant claim for medical expenses on a sounder theoretical basis.

2.3.2 The constitutional right to healthcare

Section 27 of the Constitution provides as follows:-

- (1) Everyone has the right to have access to –
 - a) Healthcare services, including reproductive healthcare

⁶² See Hosten et al. *Legal Theory* 544.

⁶³ Suggested in passing by Neethling 2005 *CILSA* 210 at 225.

- b) ...
- c) ...
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

The rights in section 27 are but a broad outline of healthcare. What this section fails to address for the purposes of this study is the noted difference between the public health establishments, which cater for the middle to low class majority of the population, and the private health establishments, which cater for the high-earning middle class to upper class.⁶⁴ Therefore, a two-tiered system of healthcare has the adverse consequences that although parties may sustain similar injuries, they may not receive the same amount in damages; in fact, there may be a great difference between the two. Thus, in keeping with the principle of *res perit domino*⁶⁵ exactly the same would have happened, where parties would sustain similar injuries but receive different treatments depending on which health system they use.

However, although this may have an effect on the quantification of damages, it does not *per se* affect the assessment of medical expenses as a head of damage. The test remains that of reasonableness and not whether the claimant incurred public or private sector expenses. The test for reasonableness will be considered in detail below.⁶⁶

In an effort to remedy this disparity, the national government is endeavouring to introduce⁶⁷ the National Health Insurance scheme (NHI).⁶⁸ In short, the NHI seeks to improve access to quality healthcare services, and provide financial risk protection against health-related catastrophic expenditure⁶⁹ for the whole population.⁷⁰ Also, perhaps importantly for the current study, the NHI is said to be aimed at significantly reducing the direct costs of healthcare.

⁶⁴ GG 34523 12 August 2011 at 4. It is alleged therein that only 16.2% of the population are on medical aid schemes.

⁶⁵ Literally meaning that damage rests where it falls, i.e. each person must bear the damage he or she suffers. See Neethling, Potgieter and Visser *Law of Delict 3* and *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) 468A–B.

⁶⁶ See 2.5.2 below.

⁶⁷ In terms of s 27(2) of the Constitution, 1996.

⁶⁸ A mandatory state medical aid scheme to be phased in over a period of 14 years (GG 34523 at 4).

⁶⁹ Defined in GG 34523 as health expenditure resulting from severe illness or injury that usually requires prolonged hospitalisation, and involves high costs for hospitals, doctors and medicines leading to the impoverishment or total financial collapse of the household.

⁷⁰ Universal coverage – progressive development of a health system including its financial mechanism into one that ensures everyone has access to quality, needed health services and where everyone is accorded protection from financial hardships linked to accessing these health services – GG 34523.

A provision is that the NHI will be funded by general revenue and from the citizens of the Republic. In as far as individuals are concerned, this would be linked to an individual's ability to pay, and benefits from health services would be in line with an individual's need for care. There would be a selection and accreditation system whereby private medical establishments would be funded under the NHI for access to healthcare by the indigent.

A real challenge awaiting the implementation of the NHI is the availability of quality medical services for the majority of the population. A major obstacle here is not necessarily the provision of access to medical healthcare to the masses, but the increase in the number of medical service providers. It is an affront to the healthcare right of the patients that they sit in long queues and wait for hours, or sometimes for more than a day, just to see a doctor, whether in a public or private medical establishment. It now begs the question, with the so-called universal coverage in sight, what effect will the NHI have on medical expenses as a head of damage in a delictual context?

It would appear from the aforesaid that 'victims' would not suffer any damage as they are to be covered under the NHI. However, this is only a simplistic overview that fails to take into account the role of co-payments under the NHI. According to the available information, the following would fall outside the scope of the NHI and therefore necessitate the normal procedures:⁷¹

- I. Services rendered not in accordance with the NHI treatment protocols and guidelines;
- II. Health benefits not covered under the NHI benefit package;
- III. Non-adherence to the appropriately defined referral system;
- IV. Services rendered by providers that are not accredited and contracted by the NHI; and
- V. Health services utilised by non-insured persons (such as tourists).

In essence, this serves to highlight that the NHI would not be a free-for-all. However, what is not apparent is whether the fund, to be established by an Act of Parliament,⁷² would have a right of recourse against the wrongdoers in delict. The most tangible solution to this dilemma, it is submitted, is if the legislature clearly expresses itself in this respect to avoid protracted litigations in respect thereto.

⁷¹ Refers to the existing rules and procedures relevant to litigation in delictual matters. See the Supreme Court Act 59 of 1959 (as amended), the Magistrates' Courts Act 32 of 1944 (as amended), the Uniform Rules and the rules regulating the conduct of proceedings of the Magistrates' Courts.

⁷² GG 34523 at 41 – 43.

Nevertheless, it is worth noting that the introduction of the NHI would still not bar members of the public from retaining or joining private medical schemes. This noble position will possibly give rise to questions about the reasonableness of incurring higher costs under the private medical scheme over those under the NHI with accredited private health care institutions. Be that as it may, enactment of a provision similar to section 2(4) of the English Law Reform (Personal Injuries) Act 1948⁷³ would settle the matter without the need for judicial interpretation.

Whether or not the NHI fund would have a right of recourse in delictual damages, it seems safe to assume that medical expenses as a head of damage would continue to exist, and the reasonableness test would continue to cater for men and women of capital resource and for those cases not covered under the NHI.

2.3.3 The contractual right to medical care in terms of medical aid

Suffice it to reiterate that the implementation of the NHI would not in any way affect the capacity of individuals to enter into 'medical aid' insurance contracts, as already alluded to in 2.3.2 above. Parties have always been at liberty to negotiate their own contracts with medical aid schemes for one reason or another.⁷⁴

It is worth noting, however, that the 'medical aid' insurance contract is a subject on its own and therefore research may be undertaken independently on this aspect. In spite of this, it is mentioned here in as far as the assessment and quantification of medical expenses are concerned, particularly having regard to the principle of *res perit domino*.

The provisions of the 'medical aid' insurance contract are negotiated between the medical aid scheme and the individual concerned or a group thereof, with the provision of payment of a premium against the guarantee of healthcare benefits common and consistent in all contracts.⁷⁵ It is trite that the cost of service in terms of private sector establishments, which for the majority of cases provide services to people on 'medical aid', is usually higher than at public (provincial) sector establishments. In light of the above, it therefore follows on logical grounds that the assessment and subsequent quantification will be essentially different. Notwithstanding this position, the test remains that of reasonableness of expenses, as indicated in 2.5.2 below.

⁷³ See 3.2.2 below.

⁷⁴ It is immaterial for the purposes of this dissertation whether one enters into the insurance contract to avoid the shortfalls at public sector establishments or whether one deems 'medical aid' a necessity or luxury.

⁷⁵ The provisions of the Consumer Protection Act 68 of 2008 must be borne in mind in this regard.

In essence, the contractual capacity and the factual reality of actually entering into a contract of insurance do not have a negative impact on the principles of the law of damages. Despite the foundational basis of ‘medical aid’ being in contracts of insurance, it needs to be ascertained whether the obligation to cater for the healthcare needs of a person has any meaningful bearing on the patrimonial nature of the right to healthcare.

From the outset it should be noted that the provision of healthcare under a contractual obligation has patrimonial undertones which cannot be ignored. Thus, the medical service provider undertakes to make available to a person around-the-clock medical care against the payment of a monthly fee. It cannot therefore be overlooked that there are budgetary ramifications involved in the provision of healthcare under contract. In essence, it can be concluded herein that the right to the care of one’s health is valued at a figure. This serves to indicate the inherent conflict between the non-patrimonial character of bodily integrity and the patrimonial nature of the interest to healthcare.

In conclusion, a case can be made for the argument that the contractual right to healthcare and its subsequent claim demonstrates strongly that medical expenses as a head of damage are incompatible with the traditional character of personality rights and therefore should not be categorised as such, but rather as a head of damage being part of the right to healthcare.

2.3.4 The statutory right to healthcare

2.3.4.1 Introduction

With the exception of the intended promulgation of the National Health Insurance Bill, legislation on medical expenses does not *per se* talk to the nature of the right but rather to the assessment mechanisms in terms of which the right to healthcare is enforced and damage is incurred. Using this point of departure, the following analysis seeks to place medical expenses as a head of damage on an even wider theoretical footing, and attempts to demonstrate its entrenched, personal material character.

As already highlighted above,⁷⁶ social security legislation has not always found favour with existing common law principles. On the one hand, the former is partly aimed at redressing socio-economic disparities⁷⁷ or managing them in a more common and consistent manner, for example the redress between the employer and the employee;⁷⁸ while the latter, on the

⁷⁶ See 1.3.3 above.

⁷⁷ E.g. the RAF Act 56 of 1996, more particularly s 17.

⁷⁸ In terms of the COID Act 130 of 1993.

other hand, is mainly aimed at attaining justice, equity and fairness. It can never be over-emphasised that measures taken in the pursuit of the socio-economic good may not necessarily be just and fair.⁷⁹ Therefore, the co-existence of the two for the same cause of action could create a serious problem of choice of law and the application of the collateral source rule.⁸⁰

There are a large number of social security Acts; however, not all of them have a bearing on the assessment and quantification of medical expenses as a head of delictual damage(s),⁸¹ and therefore the study outlined in this dissertation will be limited to a comprehensive discussion on the Road Accident Fund Act 56 of 1996 and the Road Accident Benefit Scheme Bill 2013.⁸² Limited reference will be made to three other Acts which are briefly mentioned (directly) below.

The Compensation for Occupational Injuries and Diseases Act 130 of 1993, as the title suggests, deals with procedures for claims arising out of employment. Section 73⁸³ deals with procedures for the handling of medical expenses as a head of damage.

The Social Assistance Act 13 of 2004 is an endeavour by government to ensure the social welfare of the population through the provision of social grants.⁸⁴ Section 9 of the Act provides for disability grants owing to an inability.⁸⁵ Although the section is largely silent as

⁷⁹ If one thinks here of a situation where a person who has an annual salary of R2m suffers loss of income owing to the negligent driving of another. To grant such a person the meagre amount of R 204 904 - 00 per year in terms of s 17(4)(c) of the Road Accident Fund Act 56 of 1996 borders on unjust, inequitable and unfair. Not just because it is less than the loss suffered, but in particular because the very same statute that limits the victim's claim, simultaneously takes away the victim's common law right to sue the wrongdoer for the balance in terms of s 21 of the same Act. However, this may make collective sense having regard to the socio-economic scales of a country.

⁸⁰ See an example in this regard in 2.3.4.2 below.

⁸¹ This includes the Housing Act 107 of 1997.

⁸² See GG 36138 of 8 February 2013.

⁸³ **Medical expenses**

73. (1) The commissioner or the employer individually liable or mutual association concerned, as the case may be, shall for a period of not more than two years from the date of an accident or the commencement of a disease referred to in section 65(1) pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by such accident or disease.

(2) If, in the opinion of the commissioner, further medical aid in addition to that referred to in subsection (1) will reduce the disablement from which the employee is suffering, he may pay the cost incurred in respect of such further aid or direct the employer individually liable or the mutual association concerned, as the case may be, to pay it.

⁸⁴ This is in keeping with s 27(1)(c) of the Constitution which provides that [e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

⁸⁵ **Disability grant.** A person is, subject to section 5, eligible for a disability grant, if he or she—
(a) has attained the prescribed age; and

to the circumstances leading to disability, it can be inferred that personal injury leading to a physical disability will qualify a person for a disability grant.⁸⁶

The Occupational Diseases in Mines and Works Act 78 of 1973 for its part regulates the manner and procedures for claims arising out of health hazards incurred in the course of employment in mines.

2.3.4.2 The Road Accident Fund Act 56 of 1996

The Act was promulgated specifically for incidences of personal injuries arising from or caused by the driving of a motor vehicle from which medical expenses may follow.⁸⁷ Notwithstanding the Act's noble purpose, it has attracted its fair share of contentious comments relating to the preserving of existing common law principles and ensuring that the social good is attained.

Whereas in principle the common law position in damages is to grant to the claimant the fullest possible compensation for the damage incurred, thereby placing the person in the position he/she could have been in 'but for' the damage-causing event,⁸⁸ the Act intends to safeguard the social security of the whole population. Ideally the claimant, as master of the suit, would be prompted to institute an action under a system that would best maximise his/her damages over one that restricts recovery of such damages for the common good of all parties in the same position.

This, however, is not so. Not only does the law guarantee the right to equal protection and benefit of the law in terms of section 9 of the Constitution, 1996⁸⁹ but section 21 of the RAF

(b) is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

⁸⁶ Owing to the conflicting judgments in *Road Accident Fund v Timis* (29/09) [2010] ZASCA 30 and *Makhuvela v Road Accident Fund* 2010 (1) SA 29 (GSJ), it is unclear whether the receipt of grants constitutes a *res inter alios acta* or a compensating advantage. However, because the principle of *stare decisis* is applicable in our law the receipt thereof will be taken to constitute a compensating advantage in terms of the judgment in *Timis*.

⁸⁷ However, this is not to say that the purpose of the RAF Act is solely to compensate for medical expenses arising from or caused by the driving of a motor vehicle. Here it is relegated to such expenses for the purposes of this dissertation.

⁸⁸ More on this in 2.4 below.

⁸⁹ **Equality** (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Act⁹⁰ abolishes any residuary claim against the wrongdoer in delict. In this way, not only does the Act avoid the possibility of any probable heightened dispute of the choice of law but it ensures that both capably resourced and indigent wrongdoers are treated equally.

It must, however, be admitted that section 21 is mainly directed at claims that are limited in terms of the Act, such as claims for loss of income or earning capacity, loss of support and general damages,⁹¹ and it is thus difficult to conceive of a situation in which the claimant would have a residuary claim against the wrongdoer for the cost of medical expenses, being the focus of this study.⁹² As a result, the position remains mostly unaltered by the inclusion of section 21 as far as medical expenses are concerned in that the cost must be reasonably incurred for a successful claim. For current purposes, the following two provisions of the Act will be analysed with a view to arriving at possible solutions: regulation 5(1)⁹³ and section 17(4)(a).⁹⁴

As far as regulation 5(1) is concerned, Moseneke DCJ remarked as follows in *Law Society of SA and Others v Minister for Transport and Another*:⁹⁵

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair.

⁹⁰ **Abolition of certain common law claims** (1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie—

(a) against the owner or driver of a motor vehicle; or

(b) against the employer of the driver.

(2) Subsection (1) does not apply—

(a) if the Fund or an agent is unable to pay any compensation; or

(b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle. [s 21 substituted by s 9 of Act 19 of 2005].

⁹¹ This is defined in Potgieter, Steynberg and Floyd *Law of Damages* 23 as all non-patrimonial loss (pain, suffering, etc.) as well as future loss.

⁹² One could, however, argue that medical expenses relating to secondary emotional shock is an example of such a residuary claim. But with regard to the express provision of ss (2)(b), it is therefore clear that no claim for such secondary emotional shock can be taken against the fund. See 2.5.5.2 below for the general limitation of a claim for medical and related expenses.

⁹³ Introduced into the RAF Act 56 of 1996 by the Amendment Act 19 of 2005. The section provides that the liability of the fund or agent contemplated in section 17(4B)(a) of the Act shall be determined in accordance with the Uniform Patient Fee Schedule for fees payable to the public health establishments by full-patients, prescribed under section 90(1)(b) of the National Health Act, 2003 (Act 61 of 2003) as revised from time to time.

⁹⁴ See below.

⁹⁵ 2011 (1) SA 400 (CC) 434F-G.

I have no hesitation in finding that the UPFS tariff is a tariff that is wholly inadequate and unsuited for paying compensation for medical treatment of road accident victims in the private healthcare sector. The evidence shows that virtually no competent medical practitioner in the private sector with the requisite degree of experience would consistently treat victims at UPFS rates. This simply means that all road accident victims who cannot afford private medical treatment will have no option but to submit to treatment at public health establishments.

And at 436I of the same judgment, the learned Justice concluded as follows:

I would accordingly strike down reg. 5(1) and the minister would be obliged to make a fresh determination.

There is no denying that regulation 5(1) is, in its current form, unconstitutional for implicitly forcing road accident victims to submit to public sector medical establishments by allowing only the lowest levels of cover for medical fees. The regulation could still play a role in the Act if the Minister⁹⁶ promulgates more balanced tariffs so that the public health sector establishments are not preferred to the private health sector establishments, and exorbitant fees are not charged for medical treatment.

In essence, what remains for settlement is what tariffs would be appropriate? Appropriate in the sense of allowing for services at the private health sector establishments and still staying within the bounds of the socio-economic needs that the Act aims to address. It has already been established from the Satchwell report⁹⁷ that the Act aims not at upholding the pre-accident standards of the claimant but is rather geared towards assistance. With this in mind, one is prompted to ask: Will the Minister promulgate the so-called 'ethical ceiling for private healthcare establishment' tariffs by the Health Professions Council Ethical Tariff for Medical Practitioners (HPCMP),⁹⁸ or risk using another formula and face possible litigation? One could also ask what effect the NHI, if successfully implemented, will have on the tariffs generally?

There is no denying the supremacy of the Constitution which is guaranteed by section 2⁹⁹ and its relation to section 27,¹⁰⁰ but opulence is not a sustainable culture.¹⁰¹ Therefore, the

⁹⁶ Refers to the Minister of Health.

⁹⁷ *Report of the Road Accident Fund Commission* 2002 vol 2.

⁹⁸ Held in *Law Society of SA and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) 434B-C that although this tariff has recently been scrapped, it is still used by medical practitioners as a reasonable guideline.

⁹⁹ **Supremacy of Constitution** This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

¹⁰⁰ See 2.5.1 below.

¹⁰¹ It has been noted by Nienaber and Van der Nest 2005 (68) *THRHR* 546 at 559 that "[a]lthough economic considerations are paramount if the RAF is to remain economically viable, they may not be used to discriminate against individuals or groups."

medical tariffs must be reflective of society and the financial sustainability of the Fund. The common good, the financial status of the Fund, and an equitable tariff for the provision of healthcare should not supersede the ultimate purpose of the right to healthcare. In essence, paramount regard should always be had to the optimum medical benefits to the claimant of the right to healthcare. A proper argument can be presented for the seemingly conflicting idea of the common good in terms of the Act and of the optimum medical benefits to claimants of the right to healthcare. Notwithstanding this, however, it must be noted that there is not a conflict between the two in the strict sense. Under the Act, and if the practical application of the undertaking is considered, the only limitation on a claim for medical and related expenses as a head of damage is that the expenditure must be reasonably incurred. In effect, the Act does not specifically regulate the extent, in period, of the claim under this head of damage, and one can safely assume that as a social security Act it is intended to benefit the claimant of healthcare extensively to ensure the common good of similarly placed claimants. If the absence of a regulation on this subject can be accepted as an indication by the legislature to ensure the care of claimants under this head, then one can safely infer from the omission that the optimum care of claimants was intended, and therefore there is a link between the common good and the optimum care under the Act.

It is therefore the author's considered view that the HPCMP tariff, or a similarly comparable tariff for which the former has been substituted, should be the measurable standard now and beyond the NHI's implementation.

Also to be considered is section 17(4)(a), which provides as follows:

Where a claim for compensation under subsection (1)(a) includes a claim for the costs of the future accommodation of the person in a hospital or nursing home, or treatment of or rendering of a service or supplying goods to him or her, the fund or an agent shall be entitled, after furnishing the third party concerned with the undertaking to that effect or a competent court has directed the fund or the agent to furnish such an undertaking, to compensate:-

- i. The third party in respect of the said costs after the costs have been incurred and on proof thereof.

This section is enacted for the benefit of the Fund and has the elimination of uncertainties inherent in the assessment of future damages as its object.¹⁰² However, its content is not

¹⁰² Klopper *Third Party Compensation* 169 – 170 and Potgieter, Steynberg and Floyd *Law of Damages* 460. In *Mutual & Federal Insurance Co Ltd v Ndebele* 1996 (3) SA 553 (A) 559G, the court quoted with approval the following passage from Trollop JA in *Marine & Trade Insurance Co Ltd v Katz* 1979 (4) SA 961 (A) in a case dealing with art 43(a) – predecessor for a 17(4)(a) – “...designed for the benefit of the authorised insurers and have the effect, if invoked, of eliminating the uncertainties and imponderables inherent in having to adjudicate once and for all the quantum for the future loss or damage.”

particularly clear. The view is expressed by Klopper¹⁰³ that the section does not provide an exception to the once-and-for-all rule but that at most it only modifies the time for payment.

The wording of the section '**... after the costs have been incurred and on proof thereof**' cannot be construed as creating a new and separate cause of action whenever such costs are incurred. The section conveys the view that the Fund is exonerated of liability in those medical instances not related to or too remote from the injuries sustained in the road accident. Thus, here causation is linked to damage; also that payment for the costs would only be made once incurred and there is sufficient proof of such payment. It may be categorically stated that the undertaking has the effect of periodical payments, with the exception that the proof of the Fund's liability for specific costs is of an ongoing nature.

The undertaking approach to damages compares unfavourably to the lump sum award of money; in the case of the former, the claimant is literally at the mercy of the Fund (or the relevant claims handler) in as far as the costs covered and the medical ailment are concerned, whereas in the latter instance, the amount of damages is awarded to the claimant to use at his/her discretion.

However, with the exception that the undertaking alters the traditional method of payment of damages in a lump sum, this particular legal innovation has not made a great deal of other changes. A demonstration of this point of departure ensues from the judgment in *Mutual and Federal Insurance Co Ltd v Ndebele*¹⁰⁴ where the court applied the provisions of the Apportionment of Damages Act 34 of 1956 to the implementation of an undertaking. In this case the court per Hefer JA at 561E-F held that:

[t]hey compel me to the conclusion that the expression *in respect of* was used in art 43(a)¹⁰⁵ in the wide sense as indicative merely of a relationship between the compensation and the medical costs. In that sense the expression includes an undertaking for a portion of the amount expended.

In essence, the undertaking does not in any way alter the established measures of the law of damages except, as indicated above, to modify the time for payment of future costs. The costs incurred remain reasonable.

¹⁰³ *Third Party Compensation* 170.

¹⁰⁴ 1996 (3) SA 553 (A).

¹⁰⁵ Art 43(a) of the Compulsory Motor Vehicle Act, 1972 (repealed) which was phrased in the same way as s 17(4)(a) of the Road Accident Fund Act, 1996.

However, the wording of the section and its ultimate application by the Fund are not without considerable difficulties and disadvantages which are indicated below. The following four disadvantages were highlighted by Klopper:¹⁰⁶

- a) The section does not provide for certainty regarding the exact costs covered.

Having noted the difficulty of understanding the provisions of the section, one also has to contend with a draft copy of the undertaking by the Fund which does little to bring certainty to an otherwise critical aspect of medical and related expenses as a head of damage. Herewith an example of an undertaking in its current format:

WHEREAS, the **ROAD ACCIDENT FUND** (“**the Fund**”) has, in terms of the Act settled the claim for compensation [claim number _____ and link number _____] lodged with the Fund by [**claimant’s name and identity number**] (hereinafter referred to as the “claimant”) which claim arose from the bodily injuries sustained by the claimant in the motor collision which occurred [**date and place of the collision**].

NOW THEREFORE the Fund undertakes, in terms of **section 17(4)(a)** of the Act, to compensate the claimant for the costs of the future accommodation of the injured in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods to the claimant arising out of the injuries sustained by him/her in the aforesaid accident, after the costs have been incurred and on proof thereof.

[signed for and on behalf of the Fund and by the claimant and two competent witnesses]

This is no more than a regurgitation of the wording of the section and as noted offers no clarity whatsoever as far as the exact injuries that are covered.

On the other hand, the undertaking furnished as part of a settlement between the Fund and the claimant is no more than a duplication itself; the only notable difference is its acknowledgement of the ‘*agreement*’ between the parties but it fails to outline the substantive content of the said agreement.

Herewith an example of the ‘settlement undertaking’ in its current format:

THE ROAD ACCIDENT FUND, (hereinafter referred to as “**the Fund**”)

Having settled the claim for compensation under **section 17** of the **ROAD ACCIDENT FUND, 1996 (Act 56 of 1996)**, as amended, (hereinafter referred to as the Act), lodged with the Fund by [claimant’s name and identity number] (hereinafter referred to as “the claimant”) under the Fund’s claim number _____, link number _____ and was litigated out of [name of the court and the division and the case number allocated to the case] arising from the motor collision which occurred [date and place of the collision]

Place on record that it has been agreed between the parties that the claimant shall be entitled to his proven damages emanating from the collision as contemplated by **section 17** of the Act

¹⁰⁶ Klopper *Third Party Compensation* 171.

Undertakes under **section 17(4)(a)** of the said Act to compensate the claimant for the costs of future accommodation in a hospital or nursing home or treatment of or rendering of a service or the supplying of goods to the said claimant after such costs have been incurred and on proof thereof.

[also signed as per the undertaking above].

- b) The costs have to be incurred first prior to their recovery, which may have an adverse effect on indigent claimants.

Although the wording of section 17(4)(a) creates a discretion in favour of the Fund, the following should be common and consistent in every undertaking:

- c) The costs cannot be restricted to medical costs incurred at a provincial or state facility.
- d) Care must be taken to ensure that the claim for bodily injuries and the *sequelae* are adequately identified and defined therein.

As already indicated above, section 17(4)(a) has been enacted for the benefit of the Fund and has as its object the elimination of uncertainties inherent in the assessment of future damages. However, it is argued above that the undertaking in its current format is no more than a regurgitation of the section and therefore offers no real clarity as to the costs covered.

There is no gainsaying that the undertaking as an attempt to solve the inherent problems of quantifying future loss (as far as medical and related expenses are concerned) is commendable as a positive step towards certainty in the field where little attempt was historically made. However, there is very little to suggest that the attempt was and/or is a success. Firstly, a lot of provisions in law hinge on certainty of their letter and, secondly, one can be forgiven for concluding that judging by the social nature of the Act the claimants should be less burdened with responsibility of costs. This is not to suggest that the reasonableness of the measures taken by the claimant is an altogether irrelevant fact, but rather that the inherent risk of non-payment could have been done away with.

The undertaking in its current format diverts focus from the assessment and/or quantification of damage(s) to the injuries sustained, in that much emphasis seems to be placed on the incurring of expenses for medical and related expenses, and their subsequent payment or settlement by the Fund on proof thereof. In this light and if one has regard to the letter of the provision, the claimant has to adduce proof that the injuries are a *sequelae* of the personal injury occasioned by a road accident and that the costs have been incurred subsequent thereto. In this regard the Fund, as the statutory beneficiary of the section,

holds all the aces in that the final decision on whether or not payment or settlement is to be made rests with its undertakings department. This indeed places too heavy a burden on the claimants in that the proof of loss of a medical nature is on-going, in much the same way as the loss of future damage. It is possible, however, to receive pre-approval from the claims department. Yet it is not clear as to the interval between the request for a pre-approval and the granting thereof by the undertakings department of the Fund. This would at least take away the risk of non-reimbursement, but the victim must still first incur the expenses before he or she can claim such costs from the Fund.

In conclusion, it may be said that the provisions of section 17(4)(a) and the subsequent application by the Fund boil down to an on-going burden of proof on the part of the claimants. This has the practical result that the matter, in as far as medical expenses are concerned, is not closed because claimants are constantly proving the *sequalae* of the injuries to the Fund in order to be successfully reimbursed for future medical and related expenses as they are incurred. This cannot be said to be sound legal practice, nor can it be said to be in the best interests of justice that a claim under this head of damage be kept open for a period not clearly determinable.

It is suggested here that it would make for sounder practice for the Fund and the claimant, and it would offer acceptable certainty, if the undertaking was injury-specific in the sense of defining all the possible treatments envisaged by the medical experts, as far as it is scientifically and medically possible, following the injuries sustained in the road accident. This will obviously require medico-legal reports and evidence of specialists who have treated and will probably treat the claimant in future. The Fund will in no way be prejudiced by the aforesaid, and the claimant does not stand to benefit in an unfair manner or in any way. If anything, claimants will be relieved of the burden of having to prove the *sequalae* of the injuries every time a claim in terms of the undertaking is made. In this way, the Fund will save costs of administration in that its liability would have been specifically indicated from the time that liability for medical and related expenses is proved. It has become common knowledge to many that the Fund is facing financial ruin for reasons not relevant to this study, and therefore every cent it saves will go a long way towards its sustainability.

Having noted the considerable difficulty and the somewhat implicit injustice of keeping the proof of this head of damage open indeterminably, an example is provided here of an injury-specific undertaking where the claimant has suffered brain injuries as a result of the road accident:

WHEREAS, the **ROAD ACCIDENT FUND** ("**the Fund**") has, in terms of the Act settled the claim for compensation [claim number _____ and link number _____] lodged with the Fund by [**claimant's name and identity number**] (hereinafter referred to as the "**claimant**") which claim arose from the

bodily injuries sustained by the claimant in the motor collision which occurred [date and place of the collision].

NOW THEREFORE the Fund **undertakes**, in terms of **section 17(4)(a)** of the Act, to compensate the claimant for the costs of the future accommodation of the injured in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods to the claimant arising out of the injuries sustained by him/her in the aforesaid accident, which includes but not necessarily limited to:

- I. Clinical psychology
- II. Neurosurgery
- III. Psychology
- IV. Occupational therapy (where relevant – depending on the circumstances of the case)

After the costs have been incurred and on proof thereof.

(signed and dated)

However, note that the proof hereof is not similar to proving the *sequalae* of the treatment, but rather is directed at the production of medical bills to enable the Fund to effect payment in terms of the undertaking.

It cannot be contended with unwavering conviction that medical science is an exact science, and therefore in the pursuit of certainty and justice in the application of the undertaking by the Fund, room has to be made for those rare instances when symptoms of particular illnesses or physical infirmities following from the bodily injuries occasioned by a motor vehicle accident would be improbable. Thus, allowance could also be made for further proof of *sequalae* of the accident which was not apparent as at the time of the trial or settlement. It has to be noted that the ultimate object of an award of damages, where medical expenses are a head of damage, is to compensate the claimant in full for all reasonable expenses incurred in redressing the imbalance caused by his/her loss of health.

Justice requires that one should not turn a blind eye to the inexactness of science and visit upon a particular claimant the harsh consequence that he/she could not be properly diagnosed. This is notwithstanding the burden of proof, because the application of social security legislation should not depend wholly on predetermined norms of legal practice, but rather on the ultimate intentions of particular Acts and/or provisions. In essence, the need for specifying the particular medical service should not deprive a claimant of the right to treatment when the injury in question was occasioned by the motor vehicle accident but could not be detected.

Flowing from the prevailing lack of certainty in section 17(4)(a),¹⁰⁷ it was contended in *Wright v RAF*¹⁰⁸ that in claims in respect of a handyman and domestic assistance, the costs of modifications to the home environment of the plaintiff and the additional costs of an automatic motor vehicle were all to be considered to be **‘rendering of a service or supplying of goods’** as envisaged by the section. The court concurred with this point of view.

It is trite that the courts in delictual claims tend to be conservative in awarding damages, mostly in favour of the defendants.¹⁰⁹ Such is borne by a passage in *De Jongh v Du Pisanie*¹¹⁰ that:

[t]he court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour largesse from the horn of plenty at the defendant’s expense.

This remark, however, can in no way stretch the ambit of section 17(4)(a) to include the services of an assistant and a handyman. Although modification to the house may be necessary as a result of the injuries sustained, it is cause for concern that such costs should be covered by the undertaking. Not only is the modification unrelated to the person of the ‘victim’ of a delict *per se* but it may have the effect of either enhancing or harming the value of the property of the claimant. Thus, one is inclined to conclude on the basis of the reasoning in *Wright* that the Fund is stretching the benefit conferred on it by this section and the court, with respect, should not have allowed such an undesirable interpretation of the section.

Costs of modification to the house, where necessitated by the bodily injuries, and the cost of the possibility of acquiring a special vehicle to cater for the needs of the injured person are two important considerations for costs related to medical expenses and, therefore, should be treated independently of the undertaking. Granted that an undertaking may be apportioned depending on the percentage of fault on the part of the claimant, it is not apparent from the reasoning of this case how the likelihood of the increase or decrease in the value of the estate of the plaintiff will be handled. This situation has the adverse effect of our law leaving things to chance and therefore creates a system of the winner takes all. It

¹⁰⁷ Based on a longstanding comment by Trollip JA in *Marine & Trade Insurance Co Ltd v Katz* 1979 (4) SA 961 (A) 969A, in reference to s 21(1C)(a) of the Compulsory Motor Vehicle Insurance Act 56 of 1972, from which s 17(4)(a) of Act 56 of 1996 is similarly phrased, that “I agree with the observation of the learned trial judge that the amendment is ‘unfortunately not a model of legal clarity or of the art of legal draughtsmanship’ – indeed, that is somewhat of an understatement”. This passage is quoted with approval in *Maja v South African Eagle Insurance Co Ltd* 1990 (2) SA 701 (W) 706A – B.

¹⁰⁸ [2011] JOL 27194 (ECP).

¹⁰⁹ See *Bay Passenger Transport v Franzen* 1975 (1) SA 269 (A) 274.

¹¹⁰ 2005 (5) SA 457 (SCA) 476C–D.

is suggested that such costs should have been treated differently from probable medical expenses and the costs closely related thereto, and also that contingencies must be taken into account having regard to the merits of each case.

In essence, so much of medical expenses as a head of damage hinges on the successful implementation of the NHI. Whether the undertaking would be of continued relevance and practical value is unclear at this stage. Until then, the undertaking shall continue to operate as a tool by which the Fund delays payment of future medical costs to the detriment of successful claimants burdened with the continued 'hustle' with the undertakings department of the Fund.

In conclusion, it may be said that despite the apparent lack of clarity on the subject of loss covered and the extent thereof, one thing that is definitely certain is the patrimonial character of the statutory right to healthcare as enshrined in the RAF Act, 1996. Having noted this, however, it must be brought to bear that efforts are being made to introduce a no-fault system of compensation in personal injury cases, as will be demonstrated immediately below.

2.3.4.3 The Road Accident Benefit Scheme Bill 2013

The Road Accident Benefit Scheme Bill is an endeavour by the legislature to introduce a no-fault system of compensation and deal with matters related to the assessment of damages generally. Part A of Chapter 6 is specifically dedicated to healthcare services which ultimately deal with medical and related expenses as a head of damage.

The following words will have the following meaning in terms of section 1 of the Bill where relevant for current purposes.

Beneficiary refers to:

- (a) an injured person entitled to a healthcare benefit;
- (b) a healthcare service provider entitled to payment for the provision of a healthcare service to an injured person;
- (c) a medical scheme that made payment to a contracted healthcare service provider in respect of a healthcare service provided to an injured person;
- (d) any person who made payment in respect of a healthcare service provided to an injured person by a non-contracted healthcare service provider or by a contracted service provider outside the terms of that provider's agreement with the Administrator.

Healthcare service provider refers to a service provider as defined in the National Health Act 61 of 2003, and long-term personal care refers to both medical and non-medical services provided for an extended period of time to a beneficiary who is unable to fully execute the activities of daily living.

Liability of Administrator in respect of healthcare services

31. The Administrator shall be liable to pay for –

(a) healthcare services reasonably required for the treatment and rehabilitation of injured persons including –

- (i) pre-hospital care and inter-facility transfer;
- (ii) emergency and acute care;
- (iii) hospitalisation and outpatient services;
- (iv) rehabilitative care;
- (v) vocational training;
- (vi) long-term personal care;
- (vii) orthotic and prosthetic devices and mobility aids; and
- (viii) structural changes to homes, vehicles and the workplace; and the costs of repairing or replacing mobility aids, orthotic and prosthetic devices used by the injured person which were damaged or destroyed in a road accident.

Contracted healthcare service providers

32. (1) The Administrator may enter into agreements with public and private sector healthcare service providers to provide for –

- (a) the delivery of healthcare services to injured persons and medical reports to the Administrator;
- (b) an agreed fee structure and terms of payment for healthcare services and medical reports and record keeping, which may differ, subject to affordability, value for money and an open, transparent, fair and competitive bidding process, from the tariffs prescribed by the Minister in terms of this Act;
- (c) repairing or replacing mobility aids, orthotic and prosthetic devices used by the injured person damaged or destroyed in a road accident and an agreed structure for the payment thereof;
- (d) medical, healthcare and rehabilitation policies, protocols or standards to be complied with by the contracted healthcare service provider;
- (e) the keeping of additional records of injuries and treatment provided and the provision of such records to the Administrator;
- (f) pre-approval in respect of non-emergency healthcare services; and
- (g) any other matter related to the provision of healthcare services for bodily injuries arising from road accidents.

(2) No person, other than the Administrator, shall be liable to a contracted healthcare service provider for providing a healthcare service to an injured person unless –

- (a) the healthcare service provided falls outside of the terms of the agreement between the Administrator and the healthcare service provider; or
- (b) the person is a medical scheme.

(3) If payment is made to a contracted healthcare service provider in the circumstances contemplated in subsection 2(a) or (b), the Administrator shall not be liable to the contracted healthcare service provider but to the person making the payment, in the manner set out in section 33.

Non-contracted healthcare service providers

33. (1) The Administrator shall be liable to pay a non-contracted healthcare service provider, or any person who paid such as a healthcare service provider, the costs of healthcare services provided to an injured person, provided that -

- (a) a claim must be submitted in the manner set out in the rules;
- (b) the Minister may, after consultation with the Minister of Health, limit the liability of the Administrator for the provision of healthcare services, repairing or replacing mobility aids, medical and prosthetic devices and compiling medical reports to a prescribed tariff;
- (c) if no tariff has been prescribed, the liability of the Administrator shall be limited to the reasonable and necessary costs of the healthcare service, aid or device or the medical report, provided that, in the case of a healthcare service, the service shall be considered necessary if it is –
 - (i) for the purpose of restoring the injured person's health to the extent practicable;
 - (ii) appropriate and of the quality required for that purpose;
 - (iii) performed only on a number of occasions necessary for that purpose;
 - (iv) given at a time or place appropriate for that purpose;
 - (v) of a type normally provided by a healthcare service provider; and
 - (vi) provided by a healthcare service provider of a type who is qualified to provide that service and who normally provides the healthcare service; and
- (d) the Administrator shall only be liable for healthcare services available and received in the Republic and medical reports compiled in the Republic.

(2) (a) The Administrator may, in the manner set out in the rules, require its prior approval in respect of non-emergency healthcare services.

(b) The Administrator shall not be liable in respect of such healthcare services if prior approval had been required but not obtained.

Individual treatment or rehabilitation plan

34. (1) The Administrator may determine at any time that future healthcare services should be provided to a beneficiary in terms of an individual treatment or rehabilitation plan, provided that -

- (a) the Administrator must provide information to the beneficiary regarding the process to be followed, the beneficiary's rights and the consequences of the adoption of the plan;
- (b) the following persons must be given an opportunity to participate in the preparation and costing of the plan to the extent that they are willing and able to do so –
 - (i) the beneficiary;
 - (ii) any medical practitioner providing treatment to the beneficiary; and
 - (iii) any employer or prospective employer of the beneficiary;

(c) the Administrator must request the beneficiary to consent to the plan prepared for him or her and may only adopt a plan without the written consent of the beneficiary if the beneficiary is incapable of consenting to the plan or unreasonably withholds his or her consent.

(2) For the purpose of preparing an individual treatment or rehabilitation plan, the Administrator may require a beneficiary to be assessed by a service provider, including a medical practitioner, at the cost of the Administrator;

(3) Once the Administrator determines an individual treatment or rehabilitation plan for a beneficiary -

- (a) the Administrator may direct that healthcare services required under the plan be provided by a contracted healthcare service provider or any other service provider appointed by the Administrator; and

(b) the liability of the Administrator for payment for healthcare services shall be limited to the healthcare services provided for in the plan.

The merit or otherwise of the legality of a no fault system of compensation does not fall within the ambit of this dissertation and therefore no attempt shall be made to comment on it. However, it is submitted that the above provisions are a welcome relief to medical and related expenses as a head of damage that does not enjoy too much litigation. The legislature expressed itself very well on this matter and should be commended. The changes this Bill will bring about to medical expenses as a head of damage cannot be emphasised enough. Notwithstanding this, however, it is submitted here that our law on this subject definitely desires this sort of clarity, and that the guiding language of these provisions should still be enacted into some sort of law, even in the event of the Bill not becoming law. The individualised and participatory nature of the rehabilitation plan in terms of section 34 will go a long way towards solving the inherent problems of assessing future loss. In these instances, it cannot be said that one party benefits at the expense of the other, and certainty of the plan is without a doubt a major factor that will ensure that awards for probable future medical and related expenses satisfy the object of damages, as indicated below.

2.4 Object of damages – generally

The object of damages is to place the claimant in the financial position, to the extent that money can do so, that he or she would have been in ‘*but for*’ the damage-causing event.¹¹¹ Thus, damages are the monetary equivalent of the damage (loss) caused. As far as past expenses are concerned, such costs are capable of precise arithmetic computation flowing

¹¹¹ Section 17(4)(c) of the RAF Act 56 of 1996 provides an exception to this established principle of the law of damages. Where a claim for compensation under subsection (1)

(c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding

- i. R 204 904.00 per year in the case of a claim for loss of income; and
- ii. R 204 904.00 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.

It is hard to envisage the relevance of the above section for current purposes. However, it is highlighted here to indicate the continued conflict between common law principles and social security legislation. Whereas the former is directed at ensuring fairness and justice, the latter purports to address issues of equality and socio-economic matters. In essence, notwithstanding the fact that social security legislation may make collective sense, it may not suffice as such for certain individuals. E.g. it would seem unjust for a wealthy person who loses future income due to a motor vehicle accident to have to contend with the low amount provided under the Act. This position is now entrenched in our law as the limitations passed constitutional muster in *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC). Be that as it may, the Satchwell report (RAF commission of inquiry) established that the system of compensation under the Act was geared towards assistance due to lack or loss, and not the upholding of pre-accident lifestyle expectations.

from the obvious factual reality that by the sitting of the court or when the parties settle the issue of quantum, such costs would already have been incurred. However, too much speculation and uncertainty is the order of the day as far as future loss is concerned. As shall be indicated herein under, the uncertainty might arise from the issue of the exact nature of the treatment, the quality or quantity of treatment and rehabilitation, and to some extent the costs of such treatment.

With the nature of medical expenses as a head of damage being theoretically explained, as well as the object of awarding damages, what remains is to establish how one assesses the damage emanating from this head in order to quantify the award of damages.

2.5 Assessment of medical expenses as a head of damage

2.5.1 Introduction

The point of departure in South African law, as far as medical expenses are concerned, is that the claimant is entitled to all¹¹² the medical and hospital expenses reasonably¹¹³ incurred for purposes of affecting a cure,¹¹⁴ or all reasonable cost incurred in mitigating the amount.¹¹⁵ What 'reasonable cost' amounts to is not all that clear. Here it is taken for granted that the phrase 'reasonable expenses' is understood by everyone involved. A further, and perhaps important, consideration before one delves into the meaning of reasonableness and assessment of damage is the proper date for determination.

According to Potgieter, Steynberg and Floyd,¹¹⁶ the date of the delict is the earliest date on which all the elements of a delict are present. However, this is not to imply that damage would be completed in its entirety, with effect that the proper date would be the date on which first damage occurs.¹¹⁷ Thus, in cases of medical expenses as a head of damage, the first loss occurs when the first amount for treatment is paid or payment thereof is expected to be made.

¹¹² However, regard must be had to s 1(1)(a) of the Apportionment of Damages Act 34 of 1956 which provides that where any person suffers damage that is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

¹¹³ See 2.5.2 below.

¹¹⁴ Potgieter et al. *Law of Damages* 456.

¹¹⁵ The claimant has a duty to take reasonable steps either to reduce the original loss or to avert further loss. The claimant is also entitled to the cost of such mitigation measures – Joubert *LAWSA* 40.

¹¹⁶ *Law of Damages* 92.

¹¹⁷ *Ibid.*

With the above stated point of departure, it therefore is necessary to provide clarity as to the exact meaning of the phrase 'reasonable expenses'.

2.5.2 Meaning of 'reasonable expenses'

According to Klopper,¹¹⁸ reasonableness means that the claimant must be sufficiently compensated for the injury suffered, but conversely this implies that an inordinately high award should not unnecessarily burden the defendant. What this practically means is that the claimant must demonstrate that he/she acted reasonably under the prevailing circumstances in incurring such costs or submitting himself or herself to a particular medical treatment or procedure.¹¹⁹

As a result of the aforementioned it needs to be ascertained whether the test for 'reasonableness' is objective, in the sense of considering the totality of the facts, which may include but not be limited to the seriousness of the injury, the nature of the required treatment, the availability of the service providers, and the practicality of the option(s) taken by the claimant under the prevailing circumstances, or whether the test is purely subjective, in the sense of considering only the individual circumstances of the 'victim' of a delict. Whereas the former test is generally inclusive and takes cognisance of not only general practices in the health system but also the health benefits to the 'victim', the latter test is mutually exclusive in that here one will have to analyse the personal circumstances of each individual claimant on the basis of the proof provided by the claimant, and ultimately it will include a 'wallet biopsy'¹²⁰ on the claimant in each case that comes to court for settlement. Such a position is untenable and undesirable as it will burden the court with the extra onus of determining the status of the claimant over and above whether the treatment offered has been beneficial to his/her health. Ultimately, the object of the right so infringed is the sound physical and mental wellbeing of the legal subject and does not in itself refer to the financial standing of the claimant in delict.

Notwithstanding the above, the reasonableness test must be distinguished from the necessity test. The necessity test entails a subjective enquiry into whether or not the measures taken by the claimant were strictly necessary. If the claimant, on the strength of medical opinion, undergoes medical treatment that is later proved to be unnecessary, he or

¹¹⁸ *Third Party Compensation* 146.

¹¹⁹ *Ibid* 164.

¹²⁰ This in effect means that the focus is more on the person of the 'victim' than on the injuries sustained. In essence, in employing the subjective enquiry it would be unreasonable for an indigent 'victim' of a delict to acquire the services of a private sector medical establishment as he/she would not ordinarily have afforded the cost thereof.

she should still be able to successfully claim these expenses as reasonable costs incurred. This is in line with the well-known and universally accepted principle of mitigation.¹²¹ Furthermore, it is not a requirement of the reasonableness test that the measures so undertaken be successful. However, if the results are so far removed from the intended restoration of health, then it cannot be gainsaid that the courts would hold such as being reasonably incurred. It is worth stating that there should be a close enough *nexus* between the injuries sustained and the expenses incurred.

Thus, the reasonable test ought not to be confused with the necessity test, and the loose use of the phrase 'reasonable and necessary'¹²² expenses is unfortunate. In essence, the test for reasonableness is objective, whereas the necessity test is subjective.

Further and ancillary thereto is the burden that rests with the claimant to prove that the expenses were the consequence of, and are fairly attributable to, the injuries sustained.¹²³ In other words, the injuries and the expenses should be causally connected.¹²⁴

An important matter for consideration here is the type of medical service received. It is worth noting that the claimant is not duty bound to incur the lesser expenses of a public (provincial) hospital as opposed to the usually higher rates of private medical services.¹²⁵ The judgment in *Williams v Oosthuizen*¹²⁶ sets the tone in this respect. In *casu* the court held that it cannot envisage the plaintiff going to a private clinic for the necessary operation (sic. after an assault by the defendant) but that he will be accepted at a provincial hospital. The court remarked at 184G-H:

[H]e will, I have no doubt, be accepted at Groote Schuur [a provincial hospital], where he will receive some of the best attention he could possibly receive anywhere in the world.... I am not aware of any authority to the effect that where a potential patient demands provision for future medical treatment he is entitled to be awarded the cost of a private clinic in preference to the cost of a public hospital....

Although the comments were directed at the cost of a future stay in a hospital and future treatment, it cannot be denied that it also holds true for the past expenses. Also, as will be indicated below, the plaintiff has a duty to mitigate his/her loss as witnessed by a passage at 185A of the same judgment:

¹²¹ Joubert *LAWSA* 40. See 2.5.3 below.

¹²² *Schnellen v Rondalia Assurance Corporation of SA* 1969 (1) SA 517 (W) 518F; *Ncubu v National Employers General Insurance Co Ltd* 1988 (2) SA 190 (N) 193G; and *Colarossi v Gerber* [2005] JOL 15118 (E) 12 [37].

¹²³ Joubert *LAWSA* 70.

¹²⁴ See *Law of Damages* 456 fn 32.

¹²⁵ Potgieter, Steynberg and Floyd *Law of Damages* 456. See also Kloppe *Third Party Compensation* 164.

¹²⁶ 1981 (4) SA 182 (C).

[A]nd I am of the opinion that, where he is able to choose between medical treatment at two institutions equally good, he is obliged to choose the less expensive in the case where the defendant has to pay for the treatment.¹²⁷

The *Williams* case best illustrates the conservatism with which our courts approach damages, and emphasises the need for mitigation of loss by plaintiffs. However, when confronted by the same line of argument from the defendant in *Ngubane v South African Transport Services*,¹²⁸ the court held at 784D-E:

By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need be, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving.

Although the letter of the principles of the law of damages appears to have been followed to some extent in both the *Williams* and the *Ngubane* cases, on close scrutiny discrepancies are clear. On the one hand, the *Williams* case encompasses the general principles of the law of damages, importantly the issue of mitigation of loss, and on the other hand, the *Ngubane* case demonstrates the trite law that claimants are not duty bound to bear costs at the lower scale of public establishments. However, the *Williams* case was decided at a time in South African history when race played a major role in the everyday lives of individuals, and as a result one is rather reluctant to concede that the final decision here was influenced by a principle of law over and above the prevailing political situation at the time. For its part the judgment in *Ngubane* has the tendency of confusing the reasonableness test, which as indicated is objective, with the necessity test, which considers the individual circumstances of the claimant over and above his/her health benefits. Nowhere in legal practice is there a requirement that a plaintiff gets what he/she 'deserves' because if the law were to delve into this matter there would seldom be a satisfactory outcome to any lawsuit.

There is no denying that provincial hospitals are under a bit of strain, both in as far as revenue and human resources are concerned. However, the court should not readily accept that the more expensive model of treatment is the norm because such might be better.¹²⁹ Thus, the only test is that of reasonableness and every case must be decided objectively on

¹²⁷ Cf with a passage from *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) 202 where the court quoted a passage from *Banco de Portugal v Waterlow and Sons* 1932 AC 452 which provides that "[t]he law is satisfied if the party [the plaintiff] placed in a difficult situation by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken." Although the *Everett* case was dealing with a contractual matter, the statement here quoted finds relevance in delictual litigation too.

¹²⁸ 1991 (1) SA 756 (A).

¹²⁹ *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA).

its own merits. This is borne by the court in *Maja v South African Eagle Insurance Co Ltd*¹³⁰ where it held at 709H-I:

Although Baker J in the case of *Williams v Oosthuizen* apparently took judicial knowledge of the standard of medical care at Groote Schuur hospital, I am not prepared to take judicial notice of the standard of care or treatment at Baragwanath hospital or indeed at any provincial hospital.

In light of the above, it is therefore not surprising that Regulation 5(1)¹³¹ of the Road Accident Fund Act of 1996, which gives the implicit impression of preferring public establishments to private ones, has been struck down as unconstitutional.¹³²

Any legal system that impresses upon the claimant the duty to use one medical institution over the other would not only be unjust, as was already demonstrated in the *Law Society of South Africa and Others v Minister for Transport and Another* case, but would also, to draw from Deputy Chief Justice Moseneke's words,¹³³ "drop the guillotine on a constitutional right" – thus section 27¹³⁴ of the Constitution, 1996.

To this end lessons can be derived from section 2(4) of the English Law Reform (Personal Injuries) Act 1948¹³⁵ which provides that:

[i]n an action for damages for personal injuries there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part thereof by taking advantage of the facilities available in the National Health Service.

Although no similar provision exists in South African law, emphasis on the reasonableness of the expenses test should suffice to quash any possible dispute in this regard. Furthermore, the perennial phrase in legal jurisprudence that every case has to be determined on its merits is applicable to this test. Be that as it may, as medical science is a terrain of speciality falling beyond our reach as legal scholars, expert medical evidence has to be tendered (usually in the form of medico-legal reports)¹³⁶ to establish the extent of the injuries and

¹³⁰ 1990 (2) SA 701 (W).

¹³¹ Introduced into the Road Accident Fund Act 56 of 1996 by the Amendment Act 19 of 2005. The section provides that the liability of the fund or agent contemplated in s 17(4B)(a) of the Act, shall be determined in accordance with the Uniform Patient Fee Schedule for fees payable to the public health establishments by full-patients, prescribed under s 90(1)(b) of the National Health Act, 2003 (Act 61 of 2003) as revised from time to time.

¹³² *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) 436F–I.

¹³³ *Law Society of South Africa and Others v Minister for Transport and Another* *ibid* 415C.

¹³⁴ S 27 provides that (where relevant for current purposes) everyone has the right to have access to (a) health care services...

¹³⁵ See 3.2.2 below.

¹³⁶ Potgieter, Steynberg and Floyd *Law of Damages* 456.

from which the reasonableness of the measures undertaken by the claimant may be determined.

In essence, any rule of thumb that determines a prior list of reasonable measures would most probably lead to practical difficulties. In this instance, a similar provision to section 2(4) of the Law Reform (Personal Injuries) Act 1948 would assist in predicting what would be regarded as reasonable expenses or otherwise. A clear choice by the legislature (preferably) or the courts to follow an objective or subjective approach would also assist tremendously.

2.5.3 Mitigation of loss

The duty to mitigate rests with the claimant, and refers to a legal duty on him/her to not unreasonably burden the duty of the wrongdoer to pay damages.¹³⁷ For this reason the claimant must take reasonable steps to lessen his/her losses as soon as he/she suffers loss and knows or should reasonably be aware that he/she should mitigate the loss.¹³⁸ Applied in practice, the rule on the mitigation of loss ensures that not every rand expended on damage is recovered unless the expenditure is reasonable. At face value, the rule appears to be without many complications and, in fact, very user friendly. However, if one applies it to medical and related expenses as a head of damage in its current format, problems ensue, as will be demonstrated immediately below.

It has to be noted that there is nothing to suggest that mitigation entails the use of the cheaper of the available medical treatments. To reason in this way would be absurd and indeed rightfully not supported by any authority. One has to recall here that our law does not sanction the use of any medical institution over and above any other,¹³⁹ and in fact the Appellate Division (now the Supreme Court of Appeal) authoritatively ruled in favour of the use of higher rates of private establishments in *Ngubane v South African Transport Services*.¹⁴⁰ Having noted this, the question has to be asked as to how exactly an individual should mitigate his/her medical and related expenses. Mitigating the loss should be in the sense of not unreasonably burdening the duty of the wrongdoer to pay damages but still staying within the bounds of the optimum medical benefits in the prevailing circumstances. This is a question of fact in each individual case, but it cannot be over-emphasised that if this head of damage enjoyed 'serious' litigation it would place presiding officers firmly on the horns of a dilemma.

¹³⁷ Potgieter, Steynberg and Floyd *Law of Damages* 295. See also Neethling, Potgieter and Visser *Delict* 233 and Loubser et al. *The Law of Delict in South Africa* 402.

¹³⁸ Potgieter, Steynberg and Floyd *Law of Damages* 297.

¹³⁹ Potgieter, Steynberg and Floyd *Law of Damages* 456 and Klopper *Third Party Compensation* 164.

¹⁴⁰ 1991 (1) SA 756 (A).

Thus, the competing rights and interests of the claimant where medical and related expenses are a head of damage do not necessarily outweigh the rights and interests of the wrongdoer and/or defendant. It has to be borne in mind that the court exercises considerable conservatism in awards of damages but may not disregard the right of the claimant to health as enshrined in the Constitution. In essence, the right in terms of mitigation has to be read in line with the reasonableness of expenses test in cases where medical and related expenses are a head of damage. Suffice it to say that the absence of a clear choice by the legislature creates a gaping hole in these instances, and the logical conclusion here would be to consider the reasonableness of the steps taken and make a ruling cumulatively on the duty to mitigate. In this way, if the court accepts that the steps taken by the claimant are reasonable, then it may be accepted in hindsight that the claimant did in fact mitigate his/her loss. Admittedly, this cannot be said to be the most satisfactory manner to deal with the principle of the mitigation of loss, but in the author's opinion this has sound reason in both theory and practice.

2.5.4 Past medical and related expenses

It appears that the proof of past medical expenses has become a moot point in legal practice. This stems from the fact that a schedule of accounts or medical vouchers has been accepted as sufficient evidence in recent cases.¹⁴¹ In actual fact, in many cases settlement on this aspect is reached right at the '*doors of our courts*' or at an earlier date provided the said documents are produced. In essence, one is prone to conclude here that past medical expenses remain an important theoretical aspect of damage although not many challenges are presented on it in practice.

In a legion of third party cases, it has been the norm to accede to this aspect of damages without too much deliberation.¹⁴² Whether or not past medical expenses will remain of

¹⁴¹ *Colarossi v Gerber* [2005] JOL 15118 (E) and *Jacobs v Van Zyl & Another* [2007] JOL 19988 (C), to mention just two. This is further borne by the court's remarks in *Valentine v Road Accident Fund* [2007] 3 All SA 210 (C) 214b–c that "[i]n the absence of any evidence indicating that the expenses relating to this item of the plaintiff's claim were borne by the plaintiff or her medical aid, I am unable to find that plaintiff has proved this aspect of her claim."

This is a clear indication that the court was not concerned as to the reasonableness or otherwise of the expenses, but rather needed proof of payment as envisaged by the two judgments herewith provided. See also Kloppe *Third Party Compensation* 164. The author notes that medical expenses are usually proven by the submission of appropriate vouchers or copies of actual medical accounts.

¹⁴² *Smit v The Minister of Safety and Security and others* [2001] JOL 7570 (SE); *Guzana v Road Accident Fund* [2005] JOL 13640 (C); *Strydom v Road Accident Fund* [2005] JOL 14559 (ELC); *Matsimela v Road Accident Fund* [2005] JOL 15005 (T); *Botha & Another v Road Accident Fund* [2006] JOL 16593 (SE); *Coetzer v Road Accident Fund* [2006] JOL 17642 (T); *Xoto v Road Accident Fund* [2006] JOL 17767 (Ck); *Mbele v Road Accident Fund* [2006] JOL 18078 (W); *Sinkampula v Road Accident Fund* [2007] 4 All SA 1052 (Tk); *Fortuin v Road Accident Fund* [2007] JOL 19743 (E); *Stewart & Another v Botha & Another* [2007] JOL 19789 (C);

practical relevance, and thus worthy of litigation, remains to be seen but its theoretical relevance cannot be ignored.¹⁴³

In addition to the cost of medical expenses, the claimant may have the following related expenses: transportation costs to and from hospital and holiday,¹⁴⁴ travelling expenses of the victim's family to and from hospital, the cost of an attendant,¹⁴⁵ the cost of home care or institutional care, adaptations to the home of the claimant, the purchase of a motor vehicle,¹⁴⁶ the costs of aids, and the like.

With the cost of past medical expenses becoming a moot point in legal practice it shall be noted with interest whether the related expenses would be of any continued relevance. With the decline of past medical expenses in litigation, future medical expenses, on the other hand, have received far more attention.

2.5.5 Future medical and related expenses

2.5.5.1 Assessment – A plunge into the terrain of uncertainty?

In the simplest of cases, if X slaps Y in the face and thereby chips one of his teeth, Y would need to consult a dentist and that is the end of the story. Thus, the cause of action is

Iverson v Road Accident Fund [2007] JOL 20446 (E); *Bezuidenhout v Road Accident Fund* [2008] JOL 22854 (T); *Van Vuuren v Road Accident Fund* [2009] JOL 23742 (GSJ); *D'Hooghe v Road Accident Fund* [2009] JOL 23977 (ECP).

¹⁴³ In *Coetzee v SA Railways & Harbours* 1933 CPD 565, the court held per Gardiner JP at 576 that "[t]he cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as a ground of action". This passage underscores the importance of past loss in damages and is indicative of the fact that it will remain theoretically relevant.

¹⁴⁴ *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A). In *casu* the court held, in allowing the cost of air travel to a holiday, that "[i]n my view the trial court was generous in allowing this amount. [However] [j]udging by the plaintiff's high standard of living, I am not persuaded that she would not in any event have travelled by air" (at 548C). One deems this judgment to have been made purely on the merit of the case and should not be taken as the norm setting about a culture of opulence.

¹⁴⁵ *Ngubane v South African Transport Services* 1991 (1) SA 756 (A). However, the position remains unclear in our law as to the identity of the attendant, whether such a person should be medically qualified as an attendant or whether family members of the claimant may assume this role? Be that as it may, it is unlikely that such costs would be disputed if offered by a family member. An interesting point for adjudication will be whether such costs will be awarded where the services of an attendant are actually offered by the wrongdoer him/herself. The question of loss in this regard is an important consideration.

¹⁴⁶ *Ngubane v South African Transport Services* 1991 (1) SA 756 (A). In *casu* the court held at 782G that "[a]n award to cover the costs of purchasing and maintaining a motor car can only be justified in special circumstances". Here the claimant lived in a rural area with a poor public transport system, thereby making it difficult for him to move about owing to his physical disabilities resulting from the accident.

complete immediately upon Y's tooth being chipped. Patrimonial damage would have accrued the minute Y receives a bill from the dentist. As a result, X would be liable for the arithmetically accessible expenses already incurred (and for pain and suffering if not minimal).

However, on the same facts, assume that X slaps Y so hard that the glass particles of Y's sunglasses splinter into his eyes causing severe damage to his lenses. Y consults an eye specialist who then removes the particles. Assume further that the medico-legal reports establish that there is a probability that Y will need further operations to fully restore his vision.

One could be tempted to conclude that Y should wait until such time as he had the probable operations so as to enable him to fully assess and quantify the extent of his damage (loss). This way only the reasonableness of the expenses incurred could be the issue for potential dispute in damages and would be an attractive position, one supposes, for most claimants.

However, legal practice does not subscribe to such romantic ideals of human imagination. In any event the rules on prescription militate against such a simple social state, since a delictual claim will prescribe within three years from the date it became claimable.¹⁴⁷ In our law of damages, prescription commences at the earliest date that the cause of action accrues and the debt in regard to the payment of damages becomes claimable.¹⁴⁸ In essence, once all the elements of a delict, as indicated above, are complete and the injured person is aware of or ought to be reasonably aware of the identity of the wrongdoer, prescription starts to run.¹⁴⁹

Further, it is trite that the claimant in delict, or even in contract for that matter, must claim once-and-for-all for all losses arising from the same facts and cause of action.¹⁵⁰ It therefore stands to reason that not all damage is necessarily accrued at the time the action is set down for hearing or on the date of judgment.

Prospective damage, or future medical and related expenses to be precise, refers to loss which will, with a sufficient degree of probability, materialise after the date of assessment of damage resulting from an earlier damage-causing event.¹⁵¹ It should be abundantly clear at

¹⁴⁷ In terms of s 11 of the Prescription Act 68 of 1969.

¹⁴⁸ Potgieter, Steynberg and Floyd *Law of Damages* 155 - 156.

¹⁴⁹ *Ibid* 156.

¹⁵⁰ Steynberg 2011 (2) *PELJ* 3.

¹⁵¹ Potgieter, Steynberg and Floyd *Law of Damages* 129. See also *Coetzee v SAR & H* 1933 CDP 565: "But I know of no case that goes as far as to state that a person, who as yet sustained no damage, can sue for damages

this stage of our jurisprudence's development, that the plaintiff bears the onus of proof to establish or assess the extent of his/her loss and quantify the loss. The civil¹⁵² measure of proof is the balance or preponderance of probabilities. This means that the claimant must prove that, as far as future expenses are concerned, the occurrence of the loss is more likely than not.¹⁵³ However, it is not always plain sailing as there may be uncertainties regarding future treatment. In these cases, the standard of proof is rather relaxed as is apparent from *Hendricks v President Insurance Co Ltd*.¹⁵⁴

The principle applicable to the assessment of damages has as its *ratio* the policy that the wrongdoer should not escape liability merely because the damages he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damages and that the wrongdoer is liable to pay compensation or *solatium*.¹⁵⁵

Although not bound by the expert opinions of medical specialists or their medico-legal reports, the courts are indebted to the medical practitioners for the establishment of a need or the requisite measure of the need for future medical treatment. However, it does happen that even the over-abundance of medical expertise fails to remove the uncertainties surrounding future medical treatment. This was the position in *Burger v Union National South British Insurance Co*.¹⁵⁶ The court held that it was unnecessary to resolve the uncertainty by an application of the burden of proof, and remarked as follows:

Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency¹⁵⁷ allowance be made for a possibility of that kind.¹⁵⁸

In instances such as this, our attention is drawn to the views expressed in Potgieter, Steynberg and Floyd¹⁵⁹ that one must draw a distinction between the fact (the possibility of

which may possibly be sustained in the future...prospective damages may be awarded as ancillary to the accrued damages, but they have no separate, independent force as a ground of action". See Potgieter, Steynberg and Floyd *Law of Damages* 136 - 138 generally on this.

¹⁵² Must be distinguished from the criminal measure which is proof beyond a reasonable doubt – see Bekker et al. *Criminal Procedure Handbook* generally on these.

¹⁵³ Steynberg 2011 (2) *PELJ* 5.

¹⁵⁴ 1993 (3) SA 158 (C) 165E.

¹⁵⁵ Steynberg 2011 (2) *PELJ* 5 rightfully laments the judge's loose use of the term 'damages' to connote both the loss and the compensation when this is clearly wrong and may lead to confusion.

¹⁵⁶ 1975 (4) SA 72 (W) 75D.

¹⁵⁷ Uncertain circumstances of a positive or negative nature which, independent of the defendant's conduct and if it should realise, would probably influence a person's health ... quality of life, life expectancy or dependency on support in future or could have done so in the past, and which must consequently be taken into account in a fair and realistic manner in the quantification of damages – Steynberg 2007 (70) *THRHR* 223.

¹⁵⁸ See Steynberg 2007 (70) *THRHR* 223; Steynberg 2011 (74) *THRHR* 386; Steynberg 2007 (1) *De Jure* 36 and Steynberg 2008 (1) *De Jure* 109.

future medical treatment), which must be proved on a preponderance of probabilities, and the content of the fact which, without prior knowledge of future events, need not be proved on that level. An example from case law is the case of *Burger v Union National South British Insurance Co*¹⁶⁰ where the court remarked as follows:-

If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 per cent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty.¹⁶¹

Simply put, the law of damages makes the following distinction in the assessment of loss. As far as past loss is concerned, the claimant needs to prove a probability of 51 per cent to be entitled to the full value of the loss – that is, 100 per cent, if the court finds that the expenses were reasonably incurred and that the claimant had not contributed to his/her loss. On the other hand, in the case of future expenses, the court only grants the figure representing the probability of that head of loss. It matters not whether the figure is below or above the 50 per cent.¹⁶² Say, for example, that the expert evidence establishes a 65 per cent probability of future medical and related treatment, the court would grant the amount representing that figure.¹⁶³

There is clearly a discrepancy between assessment of past losses and assessment for future loss. However, it would be unwise, if not reckless, for the courts to grant to the claimant the full value of 100 per cent based on a mere fact that he/she proved a probability of 50 per cent or more. One would do well to recall that it is the object of the law of damages to grant the fullest possible compensation to the claimant.¹⁶⁴ Therefore, to grant to the claimant the full value of the probable loss would amount to punitive damages against the wrongdoer, something which does not enjoy any support in our law. On the other hand, if the damage does occur in the future, the compensation received would most likely turn out to be insufficient to cover the costs.¹⁶⁵ Further to this the approach of the courts in damages, as

¹⁵⁹ *Law of Damages* 140 - 142.

¹⁶⁰ 1975 (4) SA 72 (W) 75D.

¹⁶¹ Also referred to in Potgieter, Steynberg and Floyd *Law of Damages* 141.

¹⁶² See Potgieter, Steynberg and Floyd *Law of Damages* 140 - 142.

¹⁶³ See *Beverley v Mutual & Federal Insurance Co* 1988 (2) SA 267 (D) 289: "If the price of the operative procedures has increased since the date of the incident, then, in assessing his prospective claim for future medical expenses, I would have to have regard to the facts as they exist as at the date of the trial, that is to say to have regard to the current cost of such procedures and not what it might have been several years before as at the date of the delict."

¹⁶⁴ See par 1.2 above.

¹⁶⁵ However, note here that Klopper 1997 *De Rebus* 487 at 488 - 491 argues that when damages are calculated in respect of the claimant's future treatment or the provision of prostheses and related equipment, the

noted above, has been that of conservatism and purports to ensure simple justice between the litigants. The prevailing legal position cannot be said to be the most pleasing or rather better way of addressing matters of inadequacy in law, but it would appear that the courts have resigned themselves to the application of this obviously unsatisfactory legal framework, as summed up by Colman J in the *Burger*¹⁶⁶ case:

The above is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure.

2.5.5.2 Extent of the claim for medical and related expenses

Much of the emphasis on the assessment of damage centres on the object of damages and the reasonableness of the measures taken by the claimant in enforcing his/her infringed rights. This has become common practice in our law, and the continuation of this legal custom has left all other legal issues pertinent to damages a little isolated to a point where one could be forgiven for believing that they are irrelevant. One example in point is the extent of the claim for medical and related expenses. Thus, the question of fact and law relate to whether the claim for medical and related expenses can be limited in time.

Section 73¹⁶⁷ of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 is an isolated exception in an area otherwise not regulated by statute. On the other hand, the Road Accident Fund Act 56 of 1996 does not venture into addressing this critically important area of this head of damage. This is notwithstanding the commendable efforts in bringing about certainty of the calculation of future loss in terms of section 17(4)(a)¹⁶⁸ of the Act.

amount of compensation has to be discounted (capitalised) at the appropriate rate of discount to prevent the plaintiff, who may earn interest on the capital sum, from obtaining an unfair advantage.

¹⁶⁶ 1975 (4) SA 72 (W) 75D.

¹⁶⁷ **Medical expenses**

73. (1) The commissioner or the employer individually liable or mutual association concerned, as the case may be, shall for a period of not more than two years from the date of an accident or the commencement of a disease referred to in section 65(1) pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by such accident or disease.

(2) If, in the opinion of the commissioner, further medical aid in addition to that referred to in subsection (1) will reduce the disablement from which the employee is suffering, he may pay the cost incurred in respect of such further aid or direct the employer individually liable or the mutual association concerned, as the case may be, to pay it.

¹⁶⁸ Where a claim for compensation under subsection (1)(a) includes a claim for the costs of the future accommodation of the person in a hospital or nursing home, or treatment of or rendering of a service or supplying goods to him or her, the fund or an agent shall be entitled, after furnishing the third party concerned with the undertaking to that effect or a competent court has directed the fund or the agent to furnish such an undertaking, to compensate:-

i. The third party in respect of the said costs after the costs have been incurred and on proof thereof.

One may be drawn into concluding that the contingency deductions herein indicated in 2.5.5.3 below serve as pointers for the extent of the claim. This line of thought cannot simply be ignored. However, contingencies generally refer to factors that may affect, either positively or negatively, the claim of the legal subject in time. Be that as it may, and helpful as contingencies may be in arriving at a figure of damages, they deal with probabilities that may or may not be realised. The extent or limitation of a claim refers here to a determinable point in future when the claim for medical and related expenses would cease. It may be argued that personal injuries only accelerate the need for medical care, and therefore that the defendant should not be burdened with the somewhat inevitable need of humans for medical care.

However, to argue in this way would be to ignore the trite principle of the law of delict that the defendant should take the claimant as he finds him/her. Furthermore, it must be noted that the defendant must, justifiably it must be added, be held liable for all damage causally flowing from his/her wrongful act, and that it is undesirable for the law to bind itself to a particular time in future as the time when the claim for medical and related expenses would cease. On the one hand, it must be accepted that current humanity lacks the prophetic foresight to conclude with certainty the time when the need for healthcare would cease, and on the other hand, it must be accepted that healthcare needs of an individual are not calculated like some other type of loss such as loss of income or support. Thus, there is not a determinable age or infirmity that requires medical and related expenditure over and above others, unlike with loss of income where the working life of a legal subject is determinable. In essence, it is submitted that the basic assessment principles and contingencies advocated for here are sufficient for the factual and legal extent of the claim for medical and related expenses.

2.5.5.3 Assessment – Laying a basic foundation

There are only a handful of things in this life that are certain. As a result thereof, it comes as no surprise that although science to some extent offers clarity and perspective on various aspects of human existence, it is not at this stage entirely accurate. In light of this, it is often said that the law is not itself an exact science and therefore it cannot be expected to offer absolute answers. As a result of this kind of thinking it follows that the undesirable level of discrepancy between the assessment of past loss, on the one hand, and the assessment of probable future loss, on the other hand, has been the norm.

The basic premise or point of departure seems to be that if medical science cannot, with absolute certainty, establish the need for and/or the extent of future medical and related treatment, the courts should not burden themselves or the wrongdoer with the prophetic foresight of establishing such need and extent of treatment. It is worth reiterating that the object of damages is not to grant perfect compensation but rather to grant to the plaintiff the fullest possible damages. Having said that, however, the development of any legal system requires that there is first a basis of departure in law before the adventures of jurisprudential research can inform and guide further theories of development.

The primary question as far as the assessment and/or quantification of future medical expenses are concerned, is whether there are definite grounds upon which development can be undertaken. One place to look for assistance is in the assessment of loss of future income or earning capacity. Actuarial calculations and established contingencies¹⁶⁹ inform the quantification of loss of earning capacity. This by no means suggests that the assessment and/or quantification of the loss of earning capacity is settled in law, but it is rather highlighted here to indicate that there is more consistency therein, and that the same basic premise from which assessment and/or quantification proceeds in cases of loss of earning capacity could be applied to uncertain future medical expenses.

There is no denying that the courts have an overriding and unfettered discretion in deciding matters that come before them for adjudication, and they are not bound by the expert testimony of specialists. However, the medical terrain is a field of speciality which, beyond the ordinary 'whiplash' cases, may prove to exceed the judicial officers' scope of knowledge. In essence, the courts are in most cases heavily reliant on the testimony of medical experts for the final determinations that they make. This is very similar to instances of loss of future income and the expert opinion of an actuary. Therefore, one is tempted to conclude that judgments relating to the probable future medical treatment are no more than the figure presented by medical evidence. It therefore stands to reason that it cannot be expected of certainty to circumvent a situation where its very existence is rather tensely defined.

Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, goes a long way towards bringing the much needed certainty to the assessment and/or quantification of probable future medical and related costs. However, as demonstrated in this dissertation, the language of the provision and its application by the Fund are not without faults.

¹⁶⁹ In *Mngomezulu v Road Accident Fund*, case number 4643/2010 (SGJ) 40 par 106, it was held that in quantifying the loss of earning capacity a general contingency deduction of 0.5% per year for the remainder of the claimant's working life, should be taken into account.

For this reason it is important that bases of departure be established in cases with probable future treatment following on from a diagnosis. It has to be ascertained whether general and/or specific contingencies are desirable in assessing the probability of such treatment. According to Steynberg,¹⁷⁰ general contingencies, on the one hand, are relevant at any stage in all people's lives and the court can take judicial notice of them. Typical examples of general contingencies in the case of claims for medical and related expenses would be early death, general deterioration of the health of the claimant due to age, improvement of treatment due to medical science, etc. In contrast, special contingencies are only relevant at specific times in specific individuals' lives and should be proved by evidence. Typical examples of special contingencies relevant here could be hereditary terminal diseases in the family history of the claimant, the working environment influencing the health condition of the claimant, restrictions on medical treatment due to religious beliefs, etc.

A factor that militates against the operation of general contingencies for this head of loss is that the application of the right to healthcare is not limited to a particular age but the needs thereof become greater with age. On the flipside, however, this argument counters itself in that the defendant should not be burdened with the general vicissitudes that would in any event have visited the claimant at some point or another. Thus, if one appreciates the argument for what it is, it therefore becomes very clear that the inevitability of death, and the probability of it coming earlier than the normal life expectancy of a person, has to be accounted for. In context, it is sound practice to include a general contingency deduction for early death. This not only places the court on a sounder footing in reaching its ultimate figure of damages but ensures that the assessment of future loss under this head takes account of the factual reality that humans are mortal in nature.

It must be determined whether the affixing of a general contingency for early death is an act that requires legislative intervention or otherwise. It cannot be emphasised enough that the need for a singular application of law is paramount in any evolving legal system and in the development thereof. Thus, in as much as actuarial tables for life expectancies become relevant as the premise from which scientists proceed in calculating the figures representing a probability for future treatment and the like, there is something inescapable about the fact that the end results are applicable on a case-by-case basis and only provide scant guidelines for future cases. This individualisation of a common occurrence in law is undesirable and probably hinders possible adventures in ascertaining sound, yet imperfect, compensation for future loss. In essence, the submission is made that the figures for a general contingency of early death must be determined from a stable point of departure. The legislature may act decisively and ascertain this figure based on the existing practice, as suggested by Koch and

¹⁷⁰ 2011 (74) *THRHR* 386.

followed in the *Mngomezulu* case; thus, a 0.5% contingency per year should be given universal application across all heads of damages.

Inviting as the assumption may appear at first, one has to appreciate that personal injuries occasioned by different delictual acts will inevitably vary. In this light, it has to be noted that the role of medical science in the process of litigation becomes even more significant. It is the author's considered view that personal injuries have to be grouped accordingly, and a general contingency of early death as advocated for here ought to be affixed according to the gravity of the injury. It therefore follows that a greater percentage should be reserved for severe cases of injuries and the percentages should decline with less serious injuries. Thus, the author calls here for a flexible approach to the general contingency of early death.

It must be emphasised that the distinction between general and special contingencies is fully observed by the author. One must further highlight that on a closer reading, the suggestion made above confuses a general contingency of early death with the special contingency of considering the gravity of the individual claimant's injury. Perhaps the above illustration demonstrates the unique nature of this head of damage as absolutely distinct from all other heads, and must be treated as such. A blanket cover of a general contingency deduction for early death that fails to account for the various injuries that may infringe the bodily integrity of the individual will not only be unjust but would not necessarily appeal to logic. It has to be accepted that personal injuries differ greatly according to their degree of severity, and that it therefore follows that in cases of very severe injuries the inevitability of death is accelerated spectacularly. A considerable amount of legal restraint will have to be exercised in cases where a medical and related expense is a head of damage. Thus, any conservative application of a legal principle that fails to account for the merits of each case of personal injury will result in justice yielding the greatest injustice. In conclusion, the possibility of early death on account of personal injury is a factor relevant in every individual claimant's life, but the specific detail of that factor does not become an altogether irrelevant consideration if one considers the nature of the loss in question. Therefore, the loss requires a working balance between a general contingency and special contingencies in conniving to arrive at a just negative or positive contingency deduction or addition.

One of the most contentious issues of the last couple of years revolves around the epidemic of HIV/AIDS.¹⁷¹ Globally 34 million people were living with HIV at the end of 2011.¹⁷² It is

¹⁷¹ However, it has to be noted that this is not a social study and as a result no attempt shall be made to determine the root causes of the epidemic and solutions to its widespread nature.

¹⁷² www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012 (last visited on 08/04/2013 at 13:40).

clear that this is an international socio-economic matter and its application in law cannot be ignored for long. It has to be noted that although the UNAIDS epidemic report notes a decrease in the number of infections among adults over the period 2001 – 2011, the numbers in the Sub-Saharan region still remain disturbingly high. The desirability of having the virus as a general contingency in cases where future medical and related expenses are probable has to be determined.

Authors Nienaber and Van der Nest¹⁷³ note that it is indisputable that HIV/AIDS has an impact on a person's life expectancy and also that the virus has the effect of lowering the life expectancy of individuals. The prevalence of the epidemic in the country¹⁷⁴ perhaps necessitates such a general contingency. The available statistics would mean that one (1) in five (5) adults is possibly living with the virus. As a result, the probability of the virus infecting a person in his/her adult life is a factor that cannot be ignored.

It is obvious that no suggestion is made here that every adult life will be bound to the virus in one way or another. However, it is indicated here that there is a greater chance that despite the general ill health that old age usually visits upon people, the spread of HIV/AIDS is a factor that may accelerate the need for more particular treatment. In conclusion, it is submitted here that a general contingency figure has to be ascertained for a percentage representing HIV/AIDS as a major threat in one's adult life. At the end of the day, the defendant ought not to be burdened with no more than the reasonable costs occasioned by his/her delictual act.

It is highlighted above that special contingencies refer to only those incidences that are relevant in a specific individual's life and at specific times. As a result of the aforementioned, it is good practice that the application of special contingencies be limited to the merits of each case. However, it is important to note that certain special contingencies have become too common, for example, hereditary diseases and unhygienic working environments.

Thus, when all is said and done, it is proposed that the following two general contingencies be set for each case of future medical and related expenses:

- A general contingency figure for the possibility of early death. It is suggested here that the legislature take decisive measures to ensure that they inform application of the law by the respective courts. However, a further suggestion is made that the

¹⁷³ 2005 (68) *THRHR* 546 at 561.

¹⁷⁴ Approximately 20% of the South African adult population had the HIV infection in 2002. See Nienaber and Van der Nest 2005 (68) *THRHR* 546 at 556.

cluster of injuries be grouped together to avoid any oppressive figures that may not speak to the facts of a person's injury.

- A general contingency figure must be made for the possibility of being infected with the HIV/AIDS virus. This figure will vary annually depending on the available statistics at the time of settlement and/or judgment. In this way, any progress in the fight against the virus is accounted for in the ultimate compensation under this head.

2.6 Quantification of medical and related expenses

2.6.1 Introduction

After the medical costs have been assessed and found to have been reasonably incurred, the courts are duty bound to quantify the extent thereof and make an order. This particular aspect of the law of damages is a bit more complicated than meets the eye. On the one hand, the court has to ensure that it awards the fullest possible compensation and that the claimant is not compensated twice over for the same cause of event and, on the other hand, it must also ensure that damages do not have a punitive element and that the wrongdoer does not escape liability owing to the diligence of the claimant or a third party paying on behalf of the claimant.

2.6.2 Inflation

It would have made for simple and arithmetic quantification if damage in the form of medical and related expenses were incurred today and damages were awarded on the same day (not even a day later). However, this is a mere fantasy that is unlikely to occur any time during the course of human existence. It so happens that it sometimes takes up to two years, or even longer, after the incurring of the damage that the damages are awarded or a settlement is reached. In that time, owing to the ravages of inflation,¹⁷⁵ the value of the currency has depreciated so that at the time of determination by the court the value, although the figures remain the same, is not the same.

Does the legal phrase *fullest possible compensation* have a narrow meaning so that a rand is compensable with a rand, irrespective of the time that has elapsed between the date of damage and the date of assessment? Or does it have the wider, more literal, meaning of placing the claimant in the same position, as far as money makes it possible, he or she would

¹⁷⁵ An economic phenomenon that leads to a sustained rise in the general level of prices or that causes a sustained depreciation in the value of money – Delpont 1982 *MBL* 115.

have been ‘*but for*’ the damage-causing event,¹⁷⁶ so that a rand is compensable with the value of that amount at the time of the award? The court when confronted with the situation in *Everson v Allianz Insurance Ltd*¹⁷⁷ decided to include in the damages the lost value of the rand. The conclusion was based on the strength of an actuary’s testimony that (174E-F and 175B-C):

to place the plaintiff in the same position as he would have been in had he not been injured, it is necessary to add to the sum of the loss as expressed in rand terms an allowance to compensate for the reduction of the buying power of the rand during the period in question...such does not amount to an indirect and legally incomplete award of interest on damages but compensates for the diminished value of the rand.

However, such a position has since been authoritatively dismissed by the Appellate Division (now the Supreme Court of Appeal) in *SA Eagle Insurance Co Ltd v Hartley*¹⁷⁸ where the court reiterated the application of the principle of currency nominalism.¹⁷⁹ The main argument against such adjustment is that it has the effect of adding interest to unliquidated amounts. However, such an argument is not convincing enough. If one acknowledges inflation both as an economic and legal fact, then the appreciation and/or depreciation of a currency becomes an inevitable fact. Therefore, the pragmatic manner of making prior determinations as to who should be burdened with depreciation and *vice versa* is obsolete in modern times when currency values can be determined with a close approximation to certainty. Secondly, the view expressed by Delport¹⁸⁰ that the principle of currency nominalism is derived from the concept of a stable economy and therefore the consequences that either party is impoverished or enriched at the expense of another, is fully supported.

This is clearly a wrong point of departure from which the law should proceed, especially in light of the fact that this dissertation has been embarked upon during a period of great economic turmoil in the country. Justice requires that no party be unfairly enriched – or even impoverished, for that matter – at the expense of another. Under the umbrella of the law of obligation there is a field regulating unjustified enrichment. It is devoid of logic and somewhat strange that justice has for a long time now had to contend with a rule whose very existence creates disparities between litigants. Currency nominalism, as a principle of

¹⁷⁶ See 1.2 above.

¹⁷⁷ 1989 (2) SA 173 (C).

¹⁷⁸ 1990 (4) SA 833 (A) 839F – H.

¹⁷⁹ A debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of the currency. Thus, the risk of depreciation lies with the creditor while the debtor is saddled with the risk of appreciation – *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 839G – H.

¹⁸⁰ 1982 MBL 115 at 119.

law, exists to create unfair results in certain situations which no system under the rule of law should be bound to perpetuate. We are currently burdened with a principle whose very unfortunate consequences we have no shame in unleashing, for reasons that cannot be supported.

2.6.3 Collateral source rule

In some instances, it may also happen that the wrongdoer's act not only causes loss but results in the claimant receiving some benefits from third parties¹⁸¹ - thus a positive side effect of a damage-causing event which increases the patrimony of the claimant or causes it not to decrease.¹⁸²

The primary question, in as far as the collateral source rule is concerned, is which benefits are deductible¹⁸³ and which are not¹⁸⁴ when quantifying the claim for damages?

Potgieter, Steynberg and Floyd¹⁸⁵ and Mukheibir¹⁸⁶ are in agreement in holding that there is no general principle that determines when a benefit received pursuant to a delict should be deducted from the claim (or not, as the case may be); thus the rule developed casuistically. The following are established *res inter alios actae* on consideration of fairness:-

- Benefits received under an ordinary contract of insurance for which premiums were paid¹⁸⁷
- Benefits received as a *solatium* or from the generosity of third parties motivated by sympathy
- Benefits excluded by legislation – for example, benefits paid in terms of the Military Pensions Act 84 of 1976¹⁸⁸

The consideration here, as is the case throughout all of the law of damages, is that the claimant should not receive double compensation – held in *Dippenaar v Shield Insurance Co*

¹⁸¹ Potgieter, Steynberg and Floyd *Law of Damages* 204.

¹⁸² Translation by Mukheibir 2011 (128) *SALJ* 246 at 250 from J Meier's unpublished thesis *Voordeeltorekening in die Suid-Afrikaanse Reg*.

¹⁸³ Compensating advantages.

¹⁸⁴ *Res inter alios acta*.

¹⁸⁵ *Law of Damages* 229.

¹⁸⁶ 2011 (128) *SALJ* 246.

¹⁸⁷ Benefits from medical aid schemes are the exception to the rule. See, however, Klopper *Third Party Compensation* 142 where it is stated that sick and medical benefits payable at the sole discretion of the third party's employer or medical fund are non-deductible.

¹⁸⁸ Steynberg and Millard 2011 (4) *PELJ* 260.

*Ltd*¹⁸⁹ to place too heavy a burden on the community – and that the wrongdoer ought not to be relieved of liability on account of some fortuitous event such as the generosity of third parties.¹⁹⁰

Owing to the casuistry of the collateral source rule, courts have not always been consistent in their application thereof. In *Ghering v Union Nasionaal Suid Britse Versekeringsmaatskappy Bpk*,¹⁹¹ when confronted with a question whether the plaintiff was entitled to any payments in respect of medical and hospital expenses for both past and future expenditure, which were payable by the Minister in terms of the regulation, the court disallowed such a claim and thus held such expenses to be compensating advantages. The rationale was that the plaintiff was entitled to such expenses as of right. However, the position adopted here is in contrast to the decision in *Klaas v Union and South West Africa Insurance Company Limited*.¹⁹² In the *Klaas* case, the Appellate Division (now the SCA) had earlier decided that such costs are *res inter alios acta* because the Compensation Commissioner had the discretion whether or not to pay medical and hospital expenses in terms of legislation.¹⁹³ The decision in *Klaas* has been criticised by Gough¹⁹⁴ who states that the Compensation Commissioner may only refuse to pay in cases of misconduct on the part of the claimant, and therefore the claimant is entitled to such expenses as of right.¹⁹⁵

The secondary question hereof is whether it is necessary and/or desirable to have clear rules determining the applicability of the collateral source rule?

At face value, it is clear that legal certainty demands that such be the case. It can be contended that despite the legal training that presiding officers get, the judgments they pass are influenced by their academic background, practical experience in the main, and their culture and personality to a lesser extent. Therefore, the casuistic approach has the effect of leaving things to chance notwithstanding the established nature of some of the trite collateral source rules. It is also worth noting that no two cases are the same.

¹⁸⁹ 1979 (2) SA 904 (A) 915.

¹⁹⁰ Potgieter, Steynberg and Floyd *Law of Damages* 233.

¹⁹¹ 1983 (2) SA 266 (C).

¹⁹² 1981 (4) SA 562 (A).

¹⁹³ See Gough 1983 (46) *THRHR* 474 generally.

¹⁹⁴ 1983 (46) *THRHR* 476 payment from a collateral source.

¹⁹⁵ See also the conflicting judgments in *Makhuvela v Road Accident Fund* 2010 (1) SA 29 (GSJ) and *Road Accident Fund v Timis* (2010) ZASCA 30 [26 March 2010]. In the former case, the court held that a foster grant is a *res inter alios acta* to a claim for loss of support, whereas in the latter case a child care grant was held to be a compensating advantage in a claim for loss of support. Note that the correctness or otherwise of either decision is immaterial here as the purpose is to highlight the practical dangers and uncertainty associated with the casuistic application of the collateral source rule.

The list of established *res inter alios actae* provided above does not go as far as addressing the absence of a general rule but rather looks at what is to be excluded from quantifying generally. Also, the means test¹⁹⁶ of Steynberg and Millard¹⁹⁷ is casuistic in application and cannot therefore be held to be a suitable solution to the absence of a general principle regulating the collateral source rule.

Indeed, current considerations of fairness and the overriding assessment principles in damages¹⁹⁸ also cannot be over-emphasised as the building block of any single, universally applicable principle regulating the collateral source rule. However, certainty being the requisite measure in the practice of the law in every field should not be confused with the exact sciences, such as mathematics. The creation of a rule in this way may have the rather undesirable result that cases are 'forced' into a particular direction to suit the set rules of law even though such practice is unjust, unfair and inequitable to the merits of the case.

What certainty requires in the application of the collateral source rule is that the courts should apply themselves correctly in dealing with cases of established *res inter alios actae* as developed in legal jurisprudence, and at the same time should not import illogical considerations¹⁹⁹ into the law of damages.

2.7 Conclusion

The discussion above demonstrated the unique nature and purport of medical expenses as a head of damage that emanates from an infringement of the claimant's bodily integrity. Owing to the unique nature of this expense, it is submitted that the right so infringed does not fall swiftly within any of the recognised private law (subjective) rights, and further that its encouragement cannot be accommodated by extension of the existing rights without theoretical difficulty of understanding. It is therefore necessary that a possible new right has to be established to cater for situations where the existing rights do not *per se* provide legally sound solutions.

The new private law (subjective) right is suggested to be **personal material property right**. An embedded interest of human personality, namely bodily integrity, is infringed with the consequence that medical expenses are incurred and a patrimonial interest of the person

¹⁹⁶ Establishing if payment or the receipt of a benefit is a direct consequence of the delict and whether it should be taken into account.

¹⁹⁷ 2011 (4) *PELJ* 260.

¹⁹⁸ That is, on the one hand, that the claimant should not receive double compensation and, on the other hand, that the wrongdoer should not be absolved of liability on account of some fortuitous event or the diligence of the claimant.

¹⁹⁹ Such as the source of the funding – *Timis* judgment.

involved is diminished by the payment thereof. This right is an intermediary between personality rights, under which bodily integrity is protected, and real rights, under which anything of monetary value and capable of ownership is protected.

The constitutional dispensation ushered in with it a culture of rights for the citizens of the country. One group of such rights are the socio-economic rights that cast a duty on the state to provide certain essential necessities to its citizens. Section 27 of the Constitution provides for, among other things, the right to healthcare. In its pursuit to meet this constitutional obligation, the government of the day is endeavouring to introduce the NHI scheme which may bring sweeping changes to medical expenses as a head of damage if there is no right of recourse by the Fund and there is no provision allowing the claimant to exercise discretion as to which service provider he/she prefers. Nonetheless, medical expenses as a head of damage should oversee the implementation of the NHI scheme.

The object of damages, as explained throughout, is to place the plaintiff, as far as money makes it possible, in the same position he/she could have been '*but for*' the damage-causing event. As far as medical expenses are concerned, this means the plaintiff would be compensated for all those expenses reasonably incurred in effecting treatment. This has been established to be an objective test taking the totality of the surrounding circumstances into account.

However, with the reasonableness test being the premise on which costs are assessed, the current trend of accepting into evidence the schedule of accounts as proof of payment without interrogating the reasonableness thereof threatens to reduce this head to a mere theoretical fantasy. Be that as it may, the parable that surrounds future expenses ensures its practical value.

As far as the assessment of future loss is concerned, too much of the uncertainty could be resolved, it is suggested, if the premise of such an assessment were an established notion. This can be achieved through the ascertainment of true and sound points of departure. The suggestion made here is that two general contingencies be the norm. Firstly, the legislature is called upon to establish percentages representing contingency figures for the possibility of early death. However, logic dictates that there are various groupings of personal injuries accruing from different personal injuries. Therefore, the content of the general suggestion is that a contingency figure be established for the various groupings of personal injuries. This will ensure that similar cases are treated similarly and ensure simple justice between parties. Secondly, it is suggested that a contingency figure be made for a percentage representing the probability of the HIV/AIDS virus as a factor hastening the loss of general health.

However, the author appreciates efforts made in the fight against the epidemic and therefore submits that the general contingency here must be flexible. Thus, an annual review must be undertaken to ensure that prevailing statuses of the fight against the epidemic are accounted for.

In cases of the Road Accident Fund Act 56 of 1996, it is perhaps no exaggeration that the legislature was too cautious in drafting section 17(4)(a), and the Fund makes the task of interpretation not easy by regurgitating the section in the provision of the undertaking itself. It is provided here that the undertaking be injury-specific and there be no illogical inclusion of provisions for alterations to the house or provisions for a new motor vehicle under the ill phrased '*...rendering of a service or supplying of goods...*'. Such has been the unaccounted for and unfortunate result that either the plaintiff is enriched or impoverished owing to the enhanced or reduced estate value. Such a cost should be dealt with separately as a cost related to the cost of medication. An undertaking should be injury-specific to avoid unnecessary administration expenditure, which the Fund in any event cannot afford as it is cash strapped.

Probably the most innovative and legally sound way of dealing with future awards is through the legislature's endeavour to promulgate the Road Accident Benefit Scheme Bill 2013. Without overstating the importance of the intended legislation in the pursuit of certainty in assessing and quantifying future loss, it is submitted here that sections 31 and 34 of the Bill are as clear guidelines of certainty of calculation as any. On the one hand, section 31 leaves no doubt as to the nature of the required treatment and rehabilitation of the injured person, while section 34, on the other hand, makes provision for a participatory treatment or rehabilitation plan. The efforts of the legislature in trying to reach certainty of calculation of future loss are both commendable and necessary in an area otherwise not satisfactorily regulated in legal jurisprudence.

Currency nominalism is not supported here because its application is unfortunate and contrary to simple justice. The fact that the principle is based on a notion of a stable economy is in sharp contrast to the economy of our country at the time of writing this dissertation. It is contended herewith that damages should take cognisance of the ravages of inflation. In conclusion, the casuistic nature of the collateral source rule has been held to not be without faults. However, what certainty requires here is not the establishment of some cumbersome, prior list of what should and should not be taken into account in awarding damages, but rather the interpretation and application of the existing rules in accordance with legal logic.

Chapter 3: English Law

3.1 Introduction

Suffice it to reiterate that bodily injuries are an almost certain occurrence in the life of a person, be they mild or serious; and medical and related expenses are an inevitable fact following causally from such violation. As a result and having considered the scope and content of the South African approach to the nature, assessment and quantification of medical and related expenses in Chapter 2 above, what follows is an in-depth comparison with the corresponding position and approach in English Law.

Whereas there appears to be a dearth of legal literature on this aspect of damages in our law, and its continued practical relevance is put to the sword by settlements reached right at the '*doors of our courts*' or at the earliest possible date,²⁰⁰ the opposite is quite true of the position or approach in England. As recent as the late 1990s, the legal aspect under consideration received the attention of the Law Commission.²⁰¹ The scope and content of the report will be examined, and it will be determined whether the recommendations made therein are of practical relevance to the continued existence of medical expenses as a head of tort damages in English law.

This dissertation will analyse the general principles of the assessment of medical and related expenses in English law, and compare the corresponding position with the prevailing theory and practice in South African law. This will be achieved through a legislative review of the aspect of damage and damages, and also the theoretical and practical approach of English law to the expenses related to medical treatment. These expenses can be referred to as being somewhat of a secondary nature. Accommodation expenses, expenses of a carer, and management of the claimant's affairs are just some of the aspects enjoying jurisprudential attention as expenses related to medical treatment. An attempt will be made to consider the implications and importance of specifically delineating these issues from the main, and the impact this may have on the subsequent quantification. A further endeavour is to determine the rules on the regulation of the duty to mitigate the claimant's loss.

The English approach of preferring the multiplier and multiplicand method of assessment to the actuarial based approach will be critically evaluated.²⁰² Attention is to be given to issues

²⁰⁰ See 2.5.3 above.

²⁰¹ Law Commission No 262 of November 1999 – *Damages for Personality Injury: Medical, Nursing and Other Expenses; Collateral Benefits. Item 1 of the Seventh Programme of Law Reform: Damages.*

²⁰² See below in 3.3.2.2.

relating to the **‘hunch’ based calculation** that the conventional method is based upon against the **systematic actuarial calculation**.

The English approach of allowing interest on pecuniary losses and the stages of such calculation is another aspect which this dissertation endeavours to touch upon. The effect of inflation *vis-à-vis* the principle of currency nominalism as aspects countered by the inclusion of interest on pecuniary damages will be evaluated, and a synopsis of the collateral source rule as an element affecting quantification will also be provided.

In conclusion, the practical application of the position in England will be compared with the position in South Africa on claims for medical expenses, and a determination will be made whether any lessons can be learned from English law.

However, it should be noted from the outset that in English law, as is the case in most common law countries, the doctrine and recognition of personality rights is non-existent in that the protection of personality is based on tort law.²⁰³ In this regard, Neethling²⁰⁴ goes as far as to state that the English common law manifestly lacks the ability to recognise and protect interests of personality which do not fall under one of the existing torts but are nevertheless worthy of protection.

3.2 The present position in respect of medical and related expenses

3.2.1 Introduction

For the purposes of this chapter, damages²⁰⁵ shall refer to the pecuniary compensation, obtainable by success in an action, for a tortious wrong the compensation for which is payable in the form of a lump sum awarded at one time, unconditionally and in sterling.²⁰⁶ Legal phrases conveying the meaning of this term are subject to certain technical interpretations and exceptions that are not relevant here barring the exceptions to the lump sum principle.²⁰⁷

²⁰³ Neethling 2005 *CILSA* 210 at 215.

²⁰⁴ *Ibid* 216.

²⁰⁵ Referred to in Magnus et al. *Unification of Tort Law* 53 as that sum of money which will put the party who has been injured, or who has suffered, in the same position as he/she would have been in if he/she had not sustained the wrong for which he/she is now getting compensation or reparation.

²⁰⁶ *McGregor on Damages* 3.

²⁰⁷ See *McGregor on Damages* 4 – 12. Periodical payments, interim and provisional awards as exceptions to the lump sum principle in respect of future pecuniary loss will be discussed in 3.3.2 below.

As a point of departure in English tort law, the principle is that only those expenses as are *reasonably* incurred or will in future be incurred will be compensated for.²⁰⁸ This seems to be the position taken by all writers²⁰⁹ on the subject, and it has become common practice to simply refer to the principle in this light without much deliberation. To this end, McGregor²¹⁰ goes as far as to state that there is no need for authority to support this statement as cases are legion that endorse such outlay in damages awarded.²¹¹ As a result of the aforementioned confidence of the repeated nature of the principle in English tort law, the dissertation shall proceed from the premise that there is clarity in this respect without provision for reference to case law.

Notwithstanding the constant use of the *reasonableness of expenses* phrase, it is important that a broader scope of such expenses is clearly set out. Thus, the following expenses can be logically assumed to be reasonable expenses flowing from any personal injury tort that violates the physical integrity of the claimant:-

- Medical treatment;
- Attendance of doctors and nurses;
- Medicines and appliances (crutches, wheelchairs, oxygen tanks and the like);
- Hospital fees;
- Cost of transportation to and from hospital; and
- Costs of transportation for visiting relatives.²¹²

There is not the slightest hint of an obligation on the part of the claimant to use the public healthcare services provided for under the National Health Service Act 1977 in terms of which he/she could be treated for free.²¹³

²⁰⁸ This is the position in most legal systems; however, one must note the test in German law; here compensation is recoverable if it is proved that the treatment was necessary for the recovery of the victim of the tort or for the improvement of his or her state of health. See Markesinis et al. *Compensation for Personal Injury* 105.

²⁰⁹ Magnus et al. *Unification of Tort Law* 69; Markesinis et al. *Compensation for Personal Injury* 98; Law Commission No. 262 at 7 and McGregor on Damages 1404.

²¹⁰ McGregor on Damages 1404.

²¹¹ However, it was held in *Sowden v Lodge*; *Crookdake v Drury* [2005] 1 All ER 581 (CA) that reasonableness must [however] be seen from the claimant's point of view and not be dictated to him by the court.

²¹² McGregor on Damages 1404. According to Magnus et al. *Unification of Tort Law* 69 there is no case which actually decides that costs of visits are recoverable; however, such claims are often conceded.

²¹³ Markesinis et al. *Compensation for Personal Injury* 98.

3.2.2 Legislative reform to prevailing legal position – public vs. private health care

Notwithstanding the general principle as indicated in 3.2.1 above, the legislature endeavoured to settle the fundamental essence and dilemma of the test for reasonableness of expenses by the introduction of section 2(4) of the Law Reform (Personal Injuries) Act 1948 c.41 which provides as follows:

In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977 or the National Health Service (Scotland) Act 1978, or of any corresponding facilities in Northern Ireland.

In light of this section, it is clear that the choice of remedy lies with the injured person. However, the choice so desired and/or taken is limited within the scope of reasonableness. In cases where there is a probability of future medical care for the plaintiff and where it is not clear whether he/she will undergo private treatment or treatment in terms of the NHS, the court determines on a '*balance of probabilities*' which establishment would be used.²¹⁴ Whereas the legislator's intentions cannot be faulted, this section is not a good example of concise legal draughtsmanship. The provision of affording claimants the opportunity to decide for themselves whether to acquire private treatment or NHS treatment in future is beneficial to the claimants as they determine the course as masters of the suits, but the fact that the NHS does not have a right of recourse against the wrongdoer in tort²¹⁵ places the system at risk of over-compensating the claimant. This follows from the fact that the current legislation does not provide any mechanism that ensures that the claimant actually does use private facilities instead of NHS facilities in the sense of imposing an obligation on claimants to spend damages as per their claims or assertions in court or any tribunal.

Suffice it to state that the burden of proof in respect of such future treatment rests with the claimant to prove that he/she will in fact undergo private treatment over availing him/herself of treatment under the NHS. Notwithstanding this evidential burden, it has to be noted that the English legal system does not afford the defendant the remedy of monitoring the use of the compensation for medical treatment. In simple terms, the defendant cannot insist that the money be used for the purpose for which it was awarded.²¹⁶ Thus, the claimant may prove on a balance of probabilities that it would be reasonable to prefer private health treatment to treatment in terms of the NHS but later

²¹⁴ *Woodrup v Nicol* P.I.Q.R Q104 CA, Q114. See *McGregor on Damages* 1406 and Law Commission No. 262 at 8–9.

²¹⁵ Sections 157 and 158 of the Road Traffic Act 1988 are the exceptions to the general rule. This relates to compensation emanating from the motor vehicle incidences of personal injuries.

²¹⁶ Markesinis et al. *Compensation for Personal Injury* 116.

decides to use such NHS facilities. The effect of the provision and the principle barring the court and the defendant from enquiring about the ultimate use of the award is that the English law of damages burdens the NHS with the risk of attending to the health needs of compensated claimants where medical expenses are a head of loss.²¹⁷ In essence, this may mean that claimants get compensated and still enjoy the social benefits accorded to everyone.

However, the courts have to some extent curtailed the overreaching consequences of this prevailing position, and in so doing provided the much needed clarity in interpreting the section in such a way that they take into account the fact that private care may not always be used.²¹⁸

It cannot be emphasised enough that the courts play a critical role in the development and ultimate application of the law, but it is somewhat unsatisfactory that the Law Commission argued that the possibility of double compensation is an objection that may be directed at all of the law of damages in respect of a system that commits itself to the once-and-for-all assessment and the lump sum compensation. In any event, this excuse of an argument has become obsolete since the promulgation of section 100 of the Courts Act 39 of 2003 providing for periodical awards. Thus, one may conclude that the probability of double compensation, that is where a person is awarded compensation on the private health scale but uses the free NHS treatment, is likely to become a moot point, provided that the court is satisfied that there is security to award periodical awards.²¹⁹

²¹⁷ Allen, Hartshorne and Martin *Damages in Tort* 9 provides that the claimant who successfully convinces the court that he will incur private medical expenses but who then chooses to spend the entire award on a holiday or gambling is not disentitled to social security and support, with the result that there is in effect [the risk of] double recovery of loss.

²¹⁸ *Cunningham v Harrison* [1973] 3 All ER 924 (CA) the court reduced the award of damages based on this probability. Lawton LJ held at 473j that “for reasons that I have already given he will probably never be able to get the necessary help [sic. in a private institution] and will have to fall back on the National Health Service and welfare services of the area in which he is living. Should the probability that he will have to rely on the National Health Service be taken into account in having regard to s 2(4) of the Law Reform (Personal Injuries) Act 1948? In my opinion the answer should be it should”. The court therefore proceeded to award 50 pounds as opposed to the 115 pounds claimed.

²¹⁹ S 100 of the Courts Act 39 of 2003:

- (3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.
- (4) For the purpose of subsection (3), the continuity of payment under an order is reasonably secure if—
 - (a) it is protected by a guarantee given under section 6 of or the Schedule to this Act,
 - (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or

Notwithstanding the fact that the discretion should be exercised judicially and on the merits of each case, it is difficult to envisage the probability of a case where the courts prefer the risk framework of the Law Commission's recommendation to the certainty offered by the legislative provision of the Courts Act 2003.

It is not only medical expenses that are compensable in terms of the English law of damages as related expenses can also be included as expenses that may affect the claimant's patrimony.

3.2.3 An outlay of related expenses

It often happens as a consequence of bodily injuries that further expenses beyond those of a medical nature are incurred. For example, the physical impairment visited upon an individual by the tort may result in him/her being unable to live in the present accommodation as it is, or at all. In essence, there may be a multitude of losses that a tort visits upon its victim which do not have a direct bearing on medical expenses, but which are related to the injuries. Herewith a number of such practical losses:

Accommodation expenses

The National Assistance Act 1948 c.29 provides in section 21 for a statutory duty on the local authority to make residential accommodation available to injured persons who are in need of such accommodation.²²⁰ An essential prerequisite for the recovery of additional accommodation expenses is that such cost, like medical expenses, must be reasonable.²²¹ Therefore, the claimant must show by means of medical evidence that his/her physical state does indeed require that special accommodation.²²² The following factors are taken into account in determining the reasonableness and need for this type of loss:

(c) the source of payment is a government or health service body.

²²⁰ Duty on the local authority to provide accommodation

(1) Subject to and in accordance with the provisions of this part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall make arrangements for providing—

(a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.

²²¹ Law Commission No. 262 at 18.

²²² *McGregor on Damages* 1419. It is contended in Law Commission No. 262 at 18 that the court's attitude on this aspect is rather flexible, i.e. once a need is established for such new or alterations to the existing accommodation, the claimants are given the relative freedom to choose the exact property or the precise nature of the alterations. It is the author's considered view that this is not to be taken literally but that medical evidence would determine what will be medically sound living conditions.

- Nature of the disabilities
- Deficiencies in the property in which the claimant currently lives – this takes a look at factors that may possibly pose a hindrance to him/her getting about.²²³

The assessment of this head is not based on the difference in value of the new or adapted accommodation over the value of the existing accommodation, but rather the interest upon that difference over the period that the new or adapted accommodation is needed; generally being the claimant's lifetime.²²⁴ However, purchasing or making alterations to property are not the only way of dealing with accommodation expenses as a new property may be leased where injuries are not of a permanent or long-term nature. In this instance, the loss constitutes the difference between the rent or rates paid prior to the injuries and the rent now payable; that is, as at the date of trial.²²⁵

Notwithstanding the claim for the cost of a new or adapted home, the claimant, as master of the suits, has an option of either pleading for institutional care or for home care.

Home or institutional care

It may happen that owing to the nature or extent of the injuries incurred, the victim needs around-the-clock care or help. The following factors may be taken into account in determining whether institutional care is appropriate, in which case the commercial value of such care is compensable, or whether home care is appropriate, in which case the cost of such care is compensable, irrespective of whether or not the claimant is under a legal duty to make recompense to the gratuitous carer:

- Hours of care required per day – this will vary depending on the recovery progress of the victim;
- Level of incapacity or extent of the injury.²²⁶

The amount recoverable, as has become custom in the law of damages, is the reasonable expenses; that is, the reasonable amount necessary to expend on paying for the appropriate level of assistance for the required number of hours.²²⁷

²²³ Markesinis et al. *Compensation for Personal Injury* 104.

²²⁴ *McGregor on Damages* 1420.

²²⁵ Markesinis et al. *Compensation for Personal Injury* 105.

²²⁶ Markesinis et al. *Compensation for Personal Injury* 99.

²²⁷ *Ibid.*

Where a person leaves paid employment to care for the claimant, he/she is entitled to the net loss of the earnings over the discounted cost of care. The overriding principle is again that of reasonableness; thus, whether it is reasonably necessary for the person to give up paid employment to care for the claimant. The circumstances of each case must therefore be taken into account.²²⁸ Where such a person is cared for at home by a relative, the award made would be paid into a trust in line with *Hunt v Severs*.²²⁹

Travel costs and the costs of aids or equipment

It is obvious that if a victim suffers a recurring injury as a result of a violation of his/her physical integrity, he/she will incur travelling expenses to and from hospital. The immediate relatives whose visits are reasonably necessary for the victim's recuperation may also incur a loss in visiting the claimant in hospital. These costs range from taxi fares to the cost of purchasing a new vehicle, depending on the circumstances.²³⁰

Further and related to this may be the costs of such aids or equipment as are reasonably necessary to enable him/her to get about in the house. This may include crutches, special baths, and the like. As in all of the law of damages, the overarching requirement is that of reasonableness; thus, whether a reasonable need has been demonstrated on the evidence for the purchase, maintenance and replacement of these items or equipment. The following factors determine such reasonableness:

- Whether the type or model of equipment was reasonable or whether the claimant ought to have bought something cheaper?
- Whether the item was something which the claimant in any event would have purchased?²³¹

In essence, all the above related expenses may be awarded in damages as long as they are reasonably incurred in the particular circumstances of the case. Therefore, having dealt with

²²⁸ Markesinis et al. *Compensation for Personal Injury* 101.

²²⁹ [1994] 2 All ER 350 (HL). In his speech Lord Bridge of Harwich held at 394g – h “but it is nevertheless important to recognise that the underlying rationale of the English law, as all the cases before *Donnelly v Joyce* demonstrate, is to enable the voluntary carer to receive proper recompense for his or her services, and I would think it appropriate for the House to take the opportunity so far as possible to bring the law of the two countries [England and Scotland] into accord by adopting the view of Lord Denning MR in *Cunningham v Harrison* that in England the injured plaintiff who recovers damages under this head should hold them on trust for the voluntary carer”.

²³⁰ Markesinis et al. *Compensation for Personal Injury* 103.

²³¹ *Ibid.*

that which a claimant is due by the process of law, it is also necessary to indicate that which he/she is not due through the legal process.

3.2.4 Mitigation of loss²³²

It is settled in law that not every penny expended is compensated for in damages. Thus, there is a duty on the claimant to mitigate his/her loss in the sense that he/she cannot recover compensation for the loss which he/she could have avoided by taking reasonable steps.²³³ The loose use of the phrase '*duty to mitigate*'²³⁴ should not defer from the fact that the onus of proof rests with the defendant to show that the claimant acted unreasonably in the circumstances.²³⁵ Whether or not the claimant has taken reasonable steps to mitigate the loss is a question of fact and will, for current purposes, depend on the medical evidence and advice on the matter.²³⁶ The corollary of the general rule on mitigation of damage is that the claimant is entitled to recover the expenses incurred in taking the reasonable steps of mitigation.²³⁷

In its application to medical expenses as a head of damage, the principle of the duty of mitigation of damage creates a somewhat contradictory phenomenon. It is not open to the defendant to argue that the cost of private treatment is unreasonable where similar treatment is available in terms of the NHS, as indicated above in 3.2.2, yet undergoing such NHS treatment may amount to mitigation of the loss. It would appear to be conceivable logic that the claimant who '*has a duty to mitigate his/her loss*' would, when confronted with the choice between the free NHS treatment and private treatment, opt for the former in view of the aforementioned duty. However, general principles of tort law inform that the tortfeasor be held liable for the loss occasioned by his/her tort. Therefore, the conclusion of the Law Commission²³⁸ that allowing for a choice between NHS and private treatment does not *per se* contravene the duty of mitigation is in line with legal principles underlying this subject. This was guided by the assumption that private treatment may offer the claimant additional [health] benefits to which the claimant is entitled, provided the expenditure is not unreasonable in itself.

²³² For a detailed discussion see *McGregor on Damages* chapter 7 generally.

²³³ Magnus et al. *Unification of Tort Law* 55 and see also *McGregor on Damages* 239.

²³⁴ The plaintiff is under no duty to mitigate his loss, [this] despite the habitual use of the phrase. Therefore, the claimant is fully entitled to be as extravagant as he pleases, but not at the expense of the defendant. See *McGregor on Damages* 241.

²³⁵ Law Commission No. 262 at 33; Allen et al. *Damages in Tort* 98.

²³⁶ Allen, Hartshorne and Martin *Damages in Tort* 100.

²³⁷ *McGregor on Damages* 236; it is not a requirement that the measures so taken be successful and this may have the effect of increasing the consequent loss beyond what it would have been had the mitigating steps not been taken.

²³⁸ Law Commission No. 262 at 33.

The background to this head of damage has been established with the result that the assessment mechanisms thereof now require some detailed analysis.

3.3 Assessment of damage²³⁹

3.3.1 Introductory remarks

Deakin, Johnston and Markesinis²⁴⁰ lay down the object of an award of damages as compensation that seeks to place the victim in the position he/she was in immediately before the occurrence of the tort of negligence. However, it should also be noted that a person's physical integrity is not the subject of commercial dealing and therefore a preservation of the *status quo* may not be at all possible. An inevitable conclusion flowing from this is that in personal injury cases, *full compensation* is not always possible and therefore authors often use *fair compensation* as the object of damages; thus, the damages awarded must be *fair, reasonable and just*.²⁴¹

As with the position in South African law,²⁴² it is provided that social security is the exception to the doctrine of fair, reasonable and just compensation. This follows from the fact that social security works on the basis of flat rates, and therefore the system is sometimes unable to preserve the pre-accident standard of living of the victim. Thus, this has the consequence that while most claimants will be under-compensated, a few stand to be over-compensated.²⁴³

The discussion that follows will focus on the assessment mechanisms for past and future medical expenses.

²³⁹ The analysis here does not extend to cover cases of recompense where there is an absence of the tortfeasor, i.e. in terms of the Criminal Injuries Compensation Scheme and the Motor Insurance Bureau - highlighted in Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 939.

²⁴⁰ *Markesinis and Deakin's Tort Law* 951. This is premised on the judgment of *Livingstone v Rawyards Coal* [1880]. Note the contrary object of an award of damages in contract, i.e. placing the innocent party, as far as money makes it possible, in the same position with respect to damages, as if the contract has been performed as first formulated in *Robinson v Harman* [1848].

²⁴¹ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 951; Markesinis et al. *Compensation for Personal Injury* 117.

²⁴² See 2.3.4.2 above.

²⁴³ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 952. This position is not uncommon to South African law as the RAF Act 56 of 1996 also has the same result as indicated above in 2.3.4.2.

3.3.2 Past medical expenses

Having regard to the rules on mitigation of loss and contributory fault,²⁴⁴ this refers to all the expenses that have been incurred in the period between the date of the accident and the date of the trial or settlement. English courts' attitude towards such figures is viewed less strictly than in the case of future loss.²⁴⁵ The principle applicable throughout the law of damages, and indeed in this dissertation, is also applicable here; that is, that the expenses must have been reasonably incurred.

It must be noted, however, that despite the noted less stringent approach in respect of past loss, one has to appreciate the economic fact that the value of money is not stagnant and therefore fluctuates.²⁴⁶ In essence, notwithstanding the full compensation rule in personal injury cases, the award so made would not communicate with the loss suffered if a pound would be compensable with a pound without having due regard to the passage of time and the value of money. It does not necessarily follow that the passage of time warrants the award of interest but the loss caused by the passage of time must be proved. In simple terms, it may be said that the law does not compensate claimants for the loss of time in cases of past damage but rather compensates them for the loss in the value of the currency which is occasioned by time. Therefore, interest will be added onto the damages award where the merits of the case allow for such a step to be taken. In fact, as far back as *Hart v Griffiths-Jones*,²⁴⁷ the court had developed the practice of taking the decline in the value of money into account when awarding damages. As a result of such a bold move by the judiciary, the legislature followed suit by the promulgation of section 35A of the Senior Court Act, 1981 c.54 which provides as follows:

- 1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given **simple interest**, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—
 - (a) in the case of any sum paid before judgment, the date of the payment; and
 - (b) in the case of the sum for which judgment is given, the date of the judgment.
- (2) In relation to a judgment given for damages for personal injuries or death which exceed £200 subsection (1) shall have effect—
 - (a) with the substitution of “shall be included” for “may be included”; and

²⁴⁴ See *McGregor on Damages* chapter 7 generally.

²⁴⁵ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 979 and the examples provided from case law in *Winkworth v Hubbard* [1960] 1 Lloyd's Rep 150 and *Rialas v Mitchel* (1984) 128 SJ 704 (CA).

²⁴⁶ See, however, *McGregor on Damages* 679 – 710.

²⁴⁷ [1948] 2 All ER 729 at 730C – D.

(b) with the addition of “unless the court is satisfied that there are special reasons to the contrary” after “given”, where first occurring.

Care should be taken to appreciate the difference between interest *as* damages (common law interest) and interest *on* damages (statutory interest).²⁴⁸ While the former is almost exclusively limited to cases of debts and compound interest is awarded,²⁴⁹ the latter is applicable to all of the law of damages and, most importantly for current purposes, to damages for personal injury torts, and simple interest is awarded.²⁵⁰ However, the discussion herein will be limited to statutory interest.

From the outset it must be indicated that interest is only recoverable in respect of past loss and not future pecuniary loss as no delay arises where the loss or expense is met by the award of damages before it has been incurred.²⁵¹ The interest is awarded for the whole amount of the special damages from the date of the accident to the date of the trial or settlement, whichever is earlier. However, it must be noted that the interest is awarded not for each head of damage but for all pecuniary loss suffered during that period.²⁵² Notwithstanding this, however, the court has discretion to determine the portion of the total sum that will be subject to an award of interest, as well as the relevant rate and period for which interest is to be awarded.²⁵³

The basic premise underlying the award of interest on damages is that claimants have to be compensated for the loss occasioned by the delay between the time of loss and the time when damages are awarded.²⁵⁴ *Cookson v Knowles*²⁵⁵ demonstrates the height of the idea and principle of dividing the assessment of loss into two parts; thus, the first part is the pecuniary loss for the period between the date of the accident and that of the trial, in which case interest would be awarded at half-rate, and the period from the date of the trial onwards, in which case no interest should be awarded. The rationale for this rule is provided

²⁴⁸ S 35A of the Senior Court Act, 1981 is an example of a statute providing for an award of interest on damages. In fact, subsection (2) makes the award of such interest compulsory unless there are special circumstances to the contrary. See *McGregor on Damages* 618.

²⁴⁹ *McGregor on Damages* 604, 617 fn 109.

²⁵⁰ McGregor opines at 636 that compound interest should be available in cases of statutory interest in personal injury cases where the claimant can prove that he has borrowed extensively to cover, for example, medical expenses. This follows from the decision of *Sempra Metals Ltd v Inland Revenue Commissioner* [2008] AC 561.

²⁵¹ Law Commission No. 262 at 27.

²⁵² Law Commission No. 262 at 28 and *McGregor on Damages* 647.

²⁵³ Law Commission No. 262 at 27. The special account rate stood at 0.5% as at 1 July 2009 to date. www.rcsolicitors.co.uk/RTA-claims/RTA/damages-guides/interest-on-damages (last visited on 28/01/2013 at 11:08).

²⁵⁴ Law Commission No. 262 at 86. See also *Jefford v Gee* [1970] 1 All ER 1202 (CA) at 1208a – b.

²⁵⁵ [1977] 2 All ER 820 (CA) at 824b – c.

by the courts' approach to the assessment of future pecuniary loss. Thus, whereas in the calculation and ultimate award of interest on damages for past loss the assessment criterion begins with the value of capital as at the date of the loss, the attitude in respect of the award of future pecuniary loss is to discount the future loss to its present value at the time of determination by the court.²⁵⁶ The reason for this position is best illustrated by *Jefford v Gee*²⁵⁷ where the court held that to give additional interest on the higher figure, that is, the determination as at the time of judgment by the court, would be not only to give interest twice but to give interest on interest. This could further be justified by the incidence of a once-off lump sum payment to the claimant.

Barring the frequent change of the special rate of interest on damages for the assessment of past loss, a case can be made for the argument that the calculation of damages for past medical and related expenses does not have many practical difficulties. With this in mind, the assessment conundrums of future medical loss will now be looked at.

3.3.3 Probable future medical expenses

3.3.3.1 Basis for earlier assessment

Authors Deakin, Johnston and Markesinis²⁵⁸ note that the traditional common law rule has always been that damages must be awarded once only in respect of each cause of action, and that they should take the form of a lump sum payment.²⁵⁹ It is in light of this traditional approach to the assessment of damage and the quantification of damages that probable medical expenses have had to be determined at the date of judgment by the court or through settlement by the parties involved. It cannot be over-emphasised that in cases of serious injuries, not all of the medical expenses would have been incurred by the time of final determination. Herein lies what one may call a great disadvantage of every legal system that uses the once-and-for-all method of damages. Thus, whereas the estimate of future developments is no more than an educated guess, neither of the parties to the dispute may have the opportunity of correcting the error.²⁶⁰ The dilemma of the once-and-for-all system of damages is best illustrated in the speech of Lord Lloyd of Berwick in *Wells v Wells*²⁶¹ where he held that:

²⁵⁶ *McGregor on Damages* 647.

²⁵⁷ [1970] 1 All ER 1202 (CA). See also *McGregor on Damages* 646 – 647.

²⁵⁸ *Markesinis and Deakin's Tort Law* 965.

²⁵⁹ However, note the statutory exception to this trite rule in terms of s 100 of the Courts Act, 2003 discussed below.

²⁶⁰ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 965.

²⁶¹ [1998] All ER 481 (HL) at 484g – h.

[i]t is the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or too much. So far as the multiplier is concerned, the plaintiff may die the next day, or he may live beyond his normal expectation of life. So far as the multiplicand is concerned, the cost of future care may exceed everyone's best estimate. Or a new cure or less expensive form of treatment may be discovered. But these uncertainties do not affect the basic principle. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured.

Without over-emphasising the dilemma of the assessment conundrum under the system of law that binds itself to the once-and-for-all method of damages, the discussion below will illustrate the measures taken in English jurisprudence to counter the effect of this trite principle of the common law. However, it should be noted that the approach to assessment provides only clear guidelines, as perfection in the assessment of future compensation is probably unattainable.

Periodical payments offer a fresh dose of clarity and a genuine shot at certainty in awards in respect of probable future medical expenses, particularly if one considers that rates for medical services are index-linked and therefore most likely to increase in a manner exceeding the rate of inflation.²⁶² The alternative measure to the traditional method is statutorily enacted in terms of section 100 of the Courts Act, 2003 which provides as follows:

- (1) A court awarding damages for future pecuniary loss in respect of personal injury—
 - (a) **may** order that the damages are wholly or partly to take the form of periodical payments, and
 - (b) **shall** consider whether to make that order.
- (2) A court awarding other damages in respect of personal injury **may, if the parties consent**, order that the damages are wholly or partly to take the form of periodical payments.
- (3) A court may not make an order for periodical payments **unless satisfied that the continuity of payment under the order is reasonably secure**.
- (4) For the purpose of subsection (3), the continuity of payment under an order is reasonably secure if—
 - (a) it is protected by a guarantee given under section 6 of the Schedule to this Act,
 - (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or
 - (c) the source of payment is a government or health service body.
- (5) An order for periodical payments may include provision—
 - (a) requiring the party responsible for the payments to use a method (selected or to be selected by him) under which the continuity of payment is reasonably secure by virtue of subsection (4);
 - (b) about how the payments are to be made, if not by a method under which the continuity of payment is reasonably secure by virtue of subsection (4);
 - (c) requiring the party responsible for the payments to take specified action to secure continuity of payment, where continuity is not reasonably secure by virtue of subsection (4);
 - (d) enabling a party to apply for a variation of provision included under paragraph (a), (b) or (c).

²⁶² Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 974.

(6) Where a person has a right to receive payments under an order for periodical payments, or where an arrangement is entered into in satisfaction of an order which gives a person a right to receive periodical payments, that person's right under the order or arrangement may not be assigned or charged without the approval of the court which made the order; and—

(a) a court shall not approve an assignment or charge unless satisfied that special circumstances make it necessary, and

(b) a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court.

(7) Where an order is made for periodical payments, an alteration of the method by which the payments are made shall be treated as a breach of the order (whether or not the method was specified under subsection (5)(b)) unless—

(a) the court which made the order declares its satisfaction that the continuity of payment under the new method is reasonably secure,

(b) the new method is protected by a guarantee given under section 6 of or the Schedule to this Act,

(c) the new method is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or

(d) the source of payment under the new method is a government or health service body.

(8) An order for periodical payments shall be treated as providing for the **amount of payments to vary by reference to the retail prices index** (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) **at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.**

(9) But an order for periodical payments may include provision—

(a) disapplying subsection (8), or

(b) modifying the effect of subsection (8).

[Emphasis added]

Despite the discretionary language of the section and the inherent risks relating to periodical damages, it is clear that it could be a handy tool in awarding damages for future expenses as a head of loss. The general vicissitudes of life cannot be predicted by people, and therefore there will always be an inherent risk that the debtor in damages may in future become unable to pay the amount of loss to the claimant for one reason or the other, and the claimants themselves tend to prefer the lump sum payment even though it may turn out to be insufficient.²⁶³ Such inherent risks are, however, countered by the fact that no blanket rule is laid down to award this form of damages and that the court must satisfy itself in terms of subsection 3 of the availability of funds to cover future costs as and when they arise.

For certainty of payment, the court is further granted the powers to determine the manner and frequency of payment of the award. The object of damages as established above in 3.3.1 is full compensation to the victim of the tort. In this sense the legislature was mindful in enacting subsection 8 to counter the effects of inflation on the value of money and indeed ensure the fullest possible compensation to the claimant. Authors Deakin, Johnston and

²⁶³ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 967.

Markesinis,²⁶⁴ however, opine that the following factors have to be taken into account in varying the amount of the award:

- The variability of the order must be included in the original settlement or order;
- Variation must be ordered where there is a chance (not certainty) that an anticipated disease, deterioration or improvement in the health of the claimant will occur;²⁶⁵
- Contingencies must be specified expressly in the original order;
- The time frame for such variation must be fixed;
- The set-out procedure for effecting such variation must be observed; and
- There must be only one application for variation per disease or deterioration as mentioned in the varying order.

It is clear that the above legislative provision that attempts to overcome the shortfalls of the once-and-for-all lump sum payment calls for scientific application by the court to enable the fullest compensation in every sense of the word. This is not to say that the once-and-for-all lump sum payment will be departed from in English law, as periodical payments do not extend to cases of pain and suffering, nor to those where the value of the loss is minimal owing to contributory negligence, nor to cases where claimants are old.²⁶⁶ It is now time to consider the English law approach to assessment of damage.

3.3.3.2 The conventional approach to assessment of damage

According to McGregor,²⁶⁷ the amount awarded for medical expenses is calculated by taking the figure of annual expenses and multiplying it by a figure, which while based upon a number of years during which the expenses will continue, is discounted to allow for the fact that a lump sum is being given.²⁶⁸ Thus, the former figure is the multiplicand and the latter is the multiplier.²⁶⁹ McGregor goes on to assert that this approach is the one that the courts utilise in the great majority of cases involving future loss.²⁷⁰

²⁶⁴ *Markesinis and Deakin's Tort Law* 974 – 975.

²⁶⁵ See criticism of this view and the last view in *McGregor on Damages* 1315.

²⁶⁶ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 973.

²⁶⁷ *McGregor on Damages* 1422.

²⁶⁸ The above exposition is the prevailing position as periodic payments have only been sporadically used by the English courts. See *McGregor on Damages* 1305 – 1316.

²⁶⁹ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 987 expresses the opinion that the multiplier must reflect not only the predicted number of years for which the loss will last but also the elements of uncertainty contained in that prediction.

²⁷⁰ *McGregor on Damages* 1422. However, it is noted that the conventional method cannot be applied in all circumstances owing to the uncertainties of the future as was the case in *Willbye v Gibbons* [2004] PIQR P15 (CA).

There is a bit of flexibility attached to the conventional approach to the calculation of damage in that there may be as many multiplicands as there are probabilities of change in the future care of the claimant. Thus, if the evidence establishes that the claimant's needs for care will vary in future, either favourably or adversely, the court will adopt a different figure for the multiplicand for each period of loss.²⁷¹ The case of a young child could provide an example of the flexibility of the approach. Assume for a second that a young boy is involved in a motor vehicle accident with the result that he suffers grave bodily injuries. It may suffice for the court to fix a figure in the immediate aftermath of the accident, but the evidence may establish that during his teenage years he will require around-the-clock care as his health will deteriorate. As it were, the court will adopt a different figure to the one it starts with.

The multiplier, on the other hand, depends on a variety of factors ranging from the age of the claimant to the nature of the injuries suffered. However, not all the factors conspire to produce a higher multiplier, but the longevity of the expected injuries is one of the factors that add to the imponderables in the assessment of future loss.²⁷² Probable future medical expenses are a unique head of loss which adds to the dilemma of the inaccuracy of the future expenses for the following reason identified by McGregor:²⁷³ that is, medical (and related) expenses are likely to continue throughout the claimant's life with the resultant fixing of a higher multiplier. Thus, because there is no start or cut-off period for their use, there is a marked indication that their calculation in terms of the conventional method may yield serious discrepancies. However, this is not to say that one should overlook the probability of the claimant using services provided for free in terms of the NHS.

The traditional approach has been that damages are assessed on the basis that the total sum of damages would be exhausted at the end of the contemplated period so that the claimant can draw money from his/her income derived from the investment of the award. This was based upon the premise that the amount of damages would be invested in equities.²⁷⁴ This mythical ideal was departed from in *Wells v Wells*²⁷⁵ where the court held that the award is expected to be invested in index-linked government stocks (ILGS). In the words of Lord Lloyd of Berwick at 485, the virtue of ILGS is that it provides a risk free investment [and therefore] provides for the claimants' future needs with minimum risk of their damages being eroded by inflation.

²⁷¹ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 987.

²⁷² *Ibid* 989.

²⁷³ *McGregor on Damages* 1424 – 1428.

²⁷⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 988.

²⁷⁵ [1998] 3 All ER 481 (HL) at 492.

It is apparent that the application of the conventional method of calculation is of a somewhat unsystematic nature and solicits judges into making what are deemed 'educated guesses'.²⁷⁶ Thus, despite its prior prevalence, the conventional method used the arbitrary rounding up of numbers with the consequence that the resultant assessment was far less precise.²⁷⁷ This clearly runs contrary to the set idea and object of the law of damages, being *full compensation*. With these relative shortfalls and criticism of the conventional method of calculation, it was therefore necessary that there should be some form of relief or departure from the instance.

3.3.3.3 The Ogden Tables – scientific calculation

Despite the courts' best attempts in *Mitchell v Mulholland*,²⁷⁸ and related cases, to dismiss the applicability of the Ogden Tables in the assessment of damage, the application thereof has now been statutorily recognised in terms of section 10 of the Civil Evidence Act, 1995. The section provides as follows:

- (1) The actuarial tables (together with explanatory notes) for use in personal injury and fatal accident cases issued from time to time by the Government Actuary's Department are admissible in evidence for the purpose of assessing, in an action for personal injury, the sum to be awarded as general damages for future pecuniary loss.
- (2) They may be proved by the production of a copy published by Her Majesty's Stationery Office.
- (3) For the purposes of this section—
 - (a) "Personal injury" includes any disease and any impairment of a person's physical or mental condition; and
 - (b) "Action for personal injury" includes an action brought by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 or the Fatal Accidents Act 1976.

The landmark case of *Wells v Wells*²⁷⁹ has authoritatively settled the matter as to the validity and applicability of the Ogden Tables. This is despite the fact that section 10 is still in force.²⁸⁰

On the evidence of this judgment, McGregor²⁸¹ concludes that the Ogden Tables are now established in the damages lexicon of English law and as the order of the day, and a prerequisite for the calculation of damages. Thus, in the opinion of the author the process of

²⁷⁶ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 965.

²⁷⁷ *McGregor on Damages* 1339.

²⁷⁸ [1971] 2 All ER 1205 (CA). At 1211h – j Edmund Davies LJ in his speech adopted the following words from *Watson v Powles* [1967] 3 All ER 721 (QB): "I remain quite unconvinced that... the actuarial approach... affords the court such a precise tool as it would desire to have in its hand... this table presents a very imprecise and therefore non-scientific mode of assessing damages....".

²⁷⁹ [1998] 3 All ER 481 (HL).

²⁸⁰ *McGregor on Damages* 1339.

²⁸¹ *Ibid.*

affixing a multiplier through the scientific use of actuarial calculation has become more precise and exact. In essence, the conventional method of assessment that entailed much guesswork, as indicated above, is now substituted for a more advanced and scientifically approved method that comes close to the ultimate attainment of the full compensation. The Tables detail figures for specific ages interpolating them so as to end up with multipliers that run to two decimal points²⁸² and are updated annually by the Professional Negligence Bar Association.²⁸³

In the assessment of damage, various other considerations and/or factors play a role in the eventual award of damages. To this end, a summary of the principles underpinning the quantification of damages will be provided.

3.4 Collateral benefits – deductibility or otherwise

3.4.1 Introduction

From the outset, it should be indicated that the list of collateral sources is not exhaustive, but only those sources that are relevant to the assessment of medical and related expenses will be discussed in this chapter. It suffices to state that compensation is not the only way by which victims of torts may be returned to the pre-accident station of life as there may also be other amounts emanating from other sources that have the effect of ameliorating the victim's financial hardship. The question is whether or not these amounts ought to be deducted from the eventual compensation awards and, if so, on what grounds.

The classic formulation of the questions surrounding collateral benefits was set out in the speech of Lord Reid in *Parry v Cleaver*²⁸⁴ where he held that:

Two questions can arise. First, what did the appellant lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damages.

Basic rules in respect of the collateral benefits developed rather casuistically and are not always precisely defined and delineated.²⁸⁵ The court was at pains in *Hussain v New Taplow*

²⁸² *Ibid.*

²⁸³ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 989.

²⁸⁴ [1969] 1 All ER 555 (HL) at 557.

²⁸⁵ *Hodgson v Trapp* [1988] 3 All ER 870 (HL) at 874.

*Mills Ltd*²⁸⁶ to try to justify the basic premise that “the common law has treated this matter as one depending on justice, reasonableness and public policy”. It noted that:

Given the inevitable divergences of judicial opinion as to what justice, reasonableness and public policy require, it is not surprising that courts in different common law jurisdictions should sometimes have solved similar problems in this field in different ways...

Despite the above discontent with the law on the application of collateral benefits, the following have been settled upon in the English jurisprudence.

3.4.2 Insurance money

It has been acceptable law since *Bradburn v Great Western Railway Co* 1874 that monies received by a claimant through an accident insurance policy are not to be taken into account in assessing the amount of compensation.²⁸⁷ The general premise from which this legal principle proceeds is that the tortfeasor should not benefit from the incidence of the victim’s insurance.²⁸⁸ However, it is doubtful or rather unclear whether the same outcome would be reached if the insurance policy were payable by a person other than the victim.²⁸⁹ Such a situation is yet to come to court for adjudication, but it is hoped that the situation will be resolved in line with the current prevailing situation that the monies are not deductible.

However, McGregor²⁹⁰ opines that the question of entitlement to such expenses in cases of medical and related expenses does not arise because the insurances under this scheme are regarded as indemnity insurances, which therefore entitle the insurers themselves to recover damages directly from the tortfeasor through the process of subrogation. In essence, the author concludes that the victim of tort has no claim in this respect against the tortfeasor as he has been covered by the insurance.

3.4.3 Gratuitous payment or care

No deduction also falls to be made from the gratuitous payment of monies or the gratuitous provision of care in awarding the final amount of damages.²⁹¹ The reason for this point of

²⁸⁶ [1988] 1 All ER 541 (HL) at 545.

²⁸⁷ Allen, Hartshorne and Martin *Damages in Tort* 233 – 234.

²⁸⁸ *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541 (HL) at 545.

²⁸⁹ Law Commission 262 at 106.

²⁹⁰ *McGregor on Damages* 1429.

²⁹¹ *Ibid* 1430.

departure was best illustrated by the speech of Lord Reid in *Parry v Cleaver*²⁹² where he held that:

It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relatives or the public at large, and that the only gainer would be the wrongdoer.

The above two positions indicate the established exceptions in the calculation of damages and in the eventual decision whether or not to deduct collateral benefits from the award of damages.

3.4.4 Social security benefits

The tone for the present position in this case was set in *Hodgson v Trapp*²⁹³ where Lord Bridge held that:

In the end the issue in these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of the impecuniosity or disability are met by the taxpayer. In this context to ask whether the taxpayer, as a 'benevolent donor', intends to benefit the 'wrongdoer', as represented by the insurer who meets the claim at the expense of the appropriate class of policy holders, seems to be entirely artificial. There could hardly be a clearer case than that of the attendance allowance payable under s 35 of the 1975 Act [Social Security Act] where the statutory benefit and the special damages claimed for cost of care are designed to meet the identical expenses. To allow recovery in such a case at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground.

The deductibility or otherwise of social security benefits is now regulated by the Social Security (Recovery of Benefits) Act 1997, and the view is that such costs are deductible from the award of damages.²⁹⁴ The general position extends also to services granted free in terms of the NHS.²⁹⁵

3.5 Conclusion

It is indicated in 3.1 above that the protection of personality in English law is based on tort law. In this way, the issue of categorisation of rights becomes a moot point. This means, for a South African legal scholar, there are no lessons to be learned in as far as the nature of

²⁹² *Parry v Cleaver* [1969] 1 All ER 555 (HL) at 558.

²⁹³ [1988] 3 All ER 870 (HL) at 876.

²⁹⁴ *McGregor on Damages* 1440.

²⁹⁵ *Ibid* 1442.

medical expenses as a head of damage that can be derived from English law. The private law (subjective) rights have become an important part of our law and there are no justifiable grounds to depart from the *status quo*. If anything, the development as advocated for in Chapter 2 above should be encouraged.

The common law principle in respect of the law of damages has become an entrenched law, and not much dispute can be brought against such law in as far as it is just, reasonable and fair. This, however, should not change the fact that the just, reasonable and fair phrase is an open-ended legal phrase that is subject to interpretation with the passing of time. In this regard it is fitting that legislative provisions are promulgated to regulate the unending need for the development of the law. Therefore, and in spite of the reservations advanced above, the promulgation of section 2(4) of the Law Reform (Personal Injuries) Act, 1948 dealing with the reasonableness of expenses incurred in medical cases is just the right antidote to a situation capable of dispute in many a case.

It cannot be denied that inflation is a legal factor in as much as it is an economic fact. Therefore, its ravages on past loss can result in the ultimate award of damages being short of the set *full compensation*; that is, unless inflation is accounted for, the injured person is unlikely to be returned to the position he/she occupied before the tort. It was with this aspect in mind that interest on damages was penned into the statute books in terms of section 35A of the Senior Court Act, 1981.

Furthermore, it is common cause that current humanity does not have prophetic foresight to predict the future perfectly. In this light, future awards are always going to be either too little or too much, depending on the circumstances. The English legislature should be commended for the attempt to curtail the probable unfortunate result of a hopeful award of damages by the promulgation of section 100 of the Courts Act 2003. The object of damages has been indicated to be the *fullest possible compensation* and the above section, conditional as its application is, brings this application closer to practicality.

The question needs to be asked whether the legislative provisions offer practical alternatives to the entrenched common law principles. It cannot be over-emphasised that the above sections place an onus on the courts to effect the common law principle of the *fullest possible compensation*. However, such an object is achievable through clear guidelines made by the various Acts herein discussed. In essence, it suffices to state that the sections perform an important function in ensuring the damages represent, as far as can be possible, the closest measure of each head of loss in every case. This is a lesson worth noting by the South African legislature.

Now, with the common law principle statutorily enhanced, it can perhaps be said that the assessment conundrums will become a lot easier than they have been. The conventional method of assessment, as supplemented by the Ogden Tables in terms of section 10 of the Civil Evidence Act, 1995, provides a sound basis for the assessment of damages. In this way one goes beyond reliance on the tried and tested principles of *reasonableness and the fullest possible compensation*, and actually focuses on the formulae that make that outcome possible. Therefore, it is the author's view that the more clearly defined the method of assessment, the closer the quantification of awards will be to the object of the fullest possible compensation.

In conclusion, it has to be noted that the Law Commission's report endorses most of the prevailing common law and statutory positions in damages. However, the Law Commission recommends that section 2(4) of the Law Reform (Personal Injuries) Act, 1948 should make provision for the NHS's right of recourse against the tortfeasors and that such right should not be limited to cases where the victim is insured against the tort.²⁹⁶ Thus, the recommendations made are in line with common sense and they are also practical.

²⁹⁶ Law Commission No. 262 at 91.

Chapter 4: Australian Law

4.1 Introduction

The classic formulation of the compensatory principle in Australia and indeed in most common law countries is that the recoverable damages are in money terms no more and no less than the plaintiff's actual loss. Thus, it is said that the law seeks to put the party who has been injured or suffered in the same position as he/she would have been in if he/she had not sustained the wrong for which compensation is being claimed.²⁹⁷ This is the general object of an award of damages. To this end there can be no more accurate expression of damages than a passage from *Walker v Floyd*²⁹⁸ where it was held that:

... the plaintiff's remedy remains damages designed to restore him, as far as money is able, to his pre-accident condition and to satisfy, again insofar as money can, needs caused by his injuries.

This chapter endeavours to compare the position in Australia, in as far as medical expenses are concerned, with the corresponding positions in both England and South Africa, and determine whether there have been jurisprudential developments in the law of damages. The underlying rationale of such a comparison is to highlight lessons that could be learned which could possibly form the basis of further development in South African law.

In endeavouring to analyse Australian jurisprudence in an effort to determine if valuable lessons may be learned, the dissertation will refer to the compensation principle as applied even in South African law. It was observed in Chapter 2 that the once-and-for-all system of compensation is inherently unsatisfactory in that it has the implicit result of the 'winner takes all'. Thus, the inaccuracy of future awards is cause for concern for any system that specifically desires to reach just, fair and reasonable awards in the interests of simple justice between litigants. It is to be demonstrated how the various jurisdictions in Australia have attempted to depart from this trite tradition of the common law and whether the measures so taken are practically sound.

Furthermore, it is to be ascertained if the needs principle, as the primary indicator of reasonableness in medical and related expenses cases, is practically significant or just an alternative measure that lacks substance. In conclusion, the dissertation will look at the law

²⁹⁷ Luntz *Assessment of Damages for Personal Injury and Death* 4.

²⁹⁸ [1995] 2 Qd. R 447 at 452.

on the mitigation of loss and the collateral source rule as important considerations for the quantification of damages.

4.2 Compensation principles

4.2.1 Introductory remarks

As noted herein above, the purpose of an award of damages is to compensate, in as far as money makes it possible, the plaintiff for the loss occasioned by the injury. The *negative interesse* form of calculation of damages as applied in South African law²⁹⁹ is also applied in Australia to mean that the plaintiff should be awarded such sums of money as will restore him or her to the position he or she would have been in if there had been no negligence.³⁰⁰ Notwithstanding the express wording of this general principle of the law, it is accepted that perfect compensation is not at all possible. In *Lee Transport Co Ltd v Watson*,³⁰¹ the court held in the written opinion of Dixon J that:

[n]o doubt it is right to remember that the purpose of damages for personal injuries is not to give a perfect compensation in money for personal suffering. Bodily injury and pain and suffering are not the subject of commercial dealing and cannot be calculated like some forms of damage in terms of money.

The law therefore acknowledges that it is not possible to use money to restore a person to a condition of physical wholeness where such a person has suffered grievous personal injury.³⁰² This is further borne by the written opinions of Gibbs and Stephen JJ in *Sherman v Evans*.³⁰³

The warning against attempting perfectly to compensate means, we think, in the case of pecuniary loss, no more than the need to make allowance for contingencies, for the vicissitudes of life, compensating for probable rather than for merely speculative detriments.

4.2.2 Once-and-for-all rule

²⁹⁹ See Potgieter, Steynberg and Floyd *Law of Damages* 80.

³⁰⁰ *Willett v Fitcher* (2005) 221 CLR 627 at 643. The court further expressed the opinion that the calculation “requires comparison with the position the plaintiff would have been in *without* the award of a lump sum for damages. It does not ... require or permit comparison with the position that the plaintiff would have been in had the disabling not been sustained but the plaintiff nonetheless had a lump sum to invest.” See also Luntz *Assessment of Damages for Personal Injury and Death* 5; Trindade & Cane *The Law of Torts in Australia* 511; and Stewart & Stuhmcke *Australian Principles of Tort Law* 587.

³⁰¹ (1940) 64 CLR 1 at 13 – 14.

³⁰² Luntz *Assessment of Damages for Personal Injury and Death* 7. See also Trindade & Cane *The Law of Torts in Australia* 512 and Tilbury *Civil Remedies* 13. The authors (Trindade & Cane and Tilbury) express the opinion that ‘full compensation’ in the context of pain and suffering or non-economic loss is watered down to ‘fair compensation’.

³⁰³ (1977) 138 CLR 563 at 585.

It is an age old principle of the common law that for one cause of action the plaintiff must recover all damages incident to the negligence, both past and probable future loss, once and forever – the so called once-and-for-all rule.³⁰⁴ The rule has been understood to mean that where a claim for damages in respect of damage resulting from the negligence of the defendant has been successfully litigated or settled, the plaintiff cannot successfully bring another action based on the same facts for any further manifestation of loss.³⁰⁵ The once-and-for-all system of damages has the consequence that damages are awarded in one universal sum (commonly referred to as a lump sum) representing all the heads of damages.³⁰⁶

It should be set out expressly from the outset that the law of damages is not an exact science, and that the continued application of the once-and-for-all system of damages further makes perfect compensation a dream that is unlikely to be realised.

In essence damages, especially in cases where future loss is also assessed in one universal sum in the present, often represents a rough estimate of the present value of prospective loss that calls on the court to engage in ‘the art of prophesying’.³⁰⁷ The general purport of the lump sum application of the once-and-for-all principle of damages is rather unsatisfactory, and as noted in *Todorovic and Another v Waller*³⁰⁸ provides an uneasy answer to the problem arising from the futurity of the incidence of a plaintiff’s loss, particularly in times of inflation.

Further difficulties circumventing the application of the rule are expressly set out by Luntz³⁰⁹ to include the following:

- Difficulty of assessment of future contingencies

If one considers that the *negative interesse* method of calculation encompasses a comparison of the known and the unknown, one therefore ought to appreciate the difficulty of such an assessment from the outset. Thus, the law attempts to compare the position of

³⁰⁴ That the once-and-for-all principle is established and has been applied for many centuries now is borne by Luntz *Assessment of Damages for Personal Injury and Death* 16 where the author refers to cases from as far back as 1701 (*Fitter v Veal*). See also Trindade & Cane *The Law of Torts in Australia* 509 and Stewart & Stuhmcke *Australian Principles of Tort Law* 588.

³⁰⁵ Luntz *Assessment of Damages for Personal Injury and Death* 16. See also Mendelson *The New Law of Torts* 40.

³⁰⁶ Luntz *Assessment of Damages for Personal Injury and Death* 20.

³⁰⁷ *Todorovic and Another v Waller* (1981) 150 CLR 402 at 412 – 413.

³⁰⁸ *Ibid* at 439.

³⁰⁹ *Assessment of Damages for Personal Injury and Death* 22 – 27.

the plaintiff with the injury to the position the plaintiff would have occupied 'but for' the injury.³¹⁰ Applied in its proper context for purposes of this dissertation, the law seeks to compare the everyday medical and related expenditure and maintenance with the expenditure most likely to be incurred on account of the injury. Suffice it to state that the *prima facie* notion in medical and related expenses may point to the conclusion that such costs would be ascertained with a close measure of certainty. Yet it should be highlighted that the law binds itself to the fullest possible compensation and not the closest possible compensation.

The problem of the difficulty of probable future loss is further compounded by the fact that the law does not make provision for the review of awards of damages, nor allows for the awarding of annuities.³¹¹ The effect of this is noted to be that awards of damages reflect no more than guesswork on the part of the court. Thus, despite the advancement in the field of medical science to enable a handicapped person to live in his/her condition for longer periods than previously, there have been no corresponding improvements in the science of prediction.³¹²

➤ Losses are not made up of lump sums

The theory of making good the loss of the plaintiff in one universal sum once-and-for-all presupposes that the losses also accrue together or that they are closely linked in time and in nature. Owing to the gravity of some personal injuries, it follows in logic that predictability of the chain of events is unlikely to be precisely ascertained and accounted for.

➤ Inflation

A further difficulty inherent in the prediction of future contingencies is the impossibility of forecasting the effects of inflation on a lump sum.³¹³

Notwithstanding the following adverse effects of the rule, it is not without advantages, as noted by Luntz.³¹⁴ One of the reasons for the rule's continued relevance is that it is saddled with finality of matters that come before court for adjudication because, as noted above, once the matter is judged there can be no other claim arising on the same facts, and neither of the parties may bring a review of the award either for being too much or too little to fully compensate the plaintiff for the loss occasioned by the negligence. The apt maxim that it is

³¹⁰ Luntz *Assessment of Damages for Personal Injury and Death* 22.

³¹¹ Luntz *Assessment of Damages for Personal Injury and Death* 22.

³¹² *Ibid* 28.

³¹³ *Ibid* 27.

³¹⁴ *Ibid* 28 – 34.

in the interests of the common good that there be an end to litigation is often used as a reason for the sustenance of the once-and-for-all rule, and provides a basis for the avoidance of congestion of cases coming to court on numerous reviews.

The court noted in *Paff v Speed*³¹⁵ in the written opinion of Fullagar J that:

[t]he whole system on which general damages are awarded is open to criticism, but the direction to a jury to award a lump sum is too well established to be now challenged, and awarding periodical payments subject to review is, of course, quite impracticable.

It is a further worry that any allowance of periodical payments or a system that makes provision for review of awards would subject the privacy of the plaintiff to continued infringement by the defendants and their agents who would seek evidence of change of the plaintiff's medical condition. The once-and-for-all rule has been the bone of contention in most common law countries, and various other jurisdictions³¹⁶ have formulated legislative exceptions which have been followed in various jurisdictions of Australia.

4.2.3 Departure from the once-and-for-all rule

There is in place only one commonly accepted piece of legislation that is universally promulgated in Australia as a statutory exception to the once-and-for-all rule. That is the Taxation Laws Amendment (Structured Settlement and Structured Orders) Act 2002. The Act, among other things, provides in section 1A for the exemption of personal injury annuity and personal injury lump sum compensation from tax. However, Mendelson³¹⁷ notes the impossibility of the Act's practicality in as far as there is no market in Australia for annuities. With this in mind the author questions the wisdom of this legislation as an exception to the once-and-for-all rule.³¹⁸

Despite the noted impractical nature of the Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002, various jurisdictions in Australia had long promulgated provisos that provide the exception to the once-and-for-all rule, as shall be indicated immediately below.

4.2.3.1 Western Australia

³¹⁵ (1961) 105 CLR 549 559.

³¹⁶ Including England. See par 3.2.2 above.

³¹⁷ *The New Law of Torts* 43.

³¹⁸ *Ibid* 44.

To counter the ‘art of prophesising’ that is inherent in the lump sum award of damages ordered at once, the legislature in Western Australia enacted section 16 in terms of the Motor Vehicle (Third Party Insurance) Act 1943 which provides as follows in subsection 4P:

(4) On the hearing and determination of any action or proceedings a Court shall, without in any way limiting its usual powers in relation thereto, have the following further powers:

(a) to award by way of general damages either a lump sum or periodical payments, or a lump sum and periodical payments, such periodical payments to be for such period and upon such terms as the Court determines; and

(b) at any time either of its own motion or on the application of any party to the action or proceedings:

(i) to review any periodical payment and either continue, vary, reduce, increase, suspend, or determine it, or on the review to order payment to the claimant of a further lump sum; or

(ii) to order that any such periodical payments be redeemed by payment of a lump sum.

The section vests the court with the power to order periodical payments either as an alternative to the lump sum damages or cumulatively therewith. The Act further allows for a review of awards of damages if the situation warrants such or on application by a party to the initial litigation. Despite it being noted that the powers of the court have been rather sparingly used since its enactment³¹⁹ and the author’s noted concern about the loose language of the section, it has to be commended as an insightful piece of legal drafting.

There is no gainsaying that the law develops through application and interpretation by the courts. Therefore, it can be safely assumed that the courts would apply their mind to the circumstances under which a departure from the established rule is necessary, and would further provide guidelines of the circumstances when a review of the award would be both necessary and in the interests of justice. Needless to say, a system of periodic payments may be the closest to the fairest of fair compensation; it is conceivable logic that such awards do not prejudice the litigants in a manner that would make them worse off than with the established once-and-for-all lump sum of damages. Thus, if the powers to order periodic payment and powers of review are applied correctly, the ravages of inflation, the guesswork nature of lump sum awards, and the multiplicity of awards would be accounted for periodically and by way of such reviews.

Thus, for current purposes, it would be in the interests of the parties concerned to account for the real market value of the plaintiff’s need to medical and related expenses.

4.2.3.2 South Australia

³¹⁹ See Luntz *Assessment of Damages for Personal Injury and Death* 36.

In South Australia section 30B of the Supreme Court Act 1935 saddles the court with the power to order interim payments as a departure from the accepted once-and-for-all rule of damages. The relevant provision of the section provides as follows:

(1) Where in any action the court determines that a party is entitled to recover damages from another party, it shall be lawful for the court to enter declaratory judgment finally determining the question of liability between the parties, in favour of the party who is entitled to recover damages as aforesaid, and to adjourn the final assessment thereof.

(2) It shall be lawful for the court when entering declaratory judgment and for any judge of the court at any time or times thereafter—

(a) to make orders that the party held liable make such payment or payments on account of the damages to be assessed as to the court seems just; and

(b) in addition to any such order or in lieu thereof, to order that the party held liable make periodic payments to the other party on account of the damages to be assessed during a stated period or until further order[.]

It is noted by Luntz³²⁰ that the purpose of the above section is to encourage early hearings on liability and to defer the assessment of damages so as to do more precise justice to the litigants. The application of this section is a matter of the court's unfettered discretion, and it may deploy this section on its own volition as was demonstrated by the judgment in *Revesz v Orchard* [1969] SASR 336.³²¹

It is doubtful whether interim payments could be of any better use in cases of medical and related expenses than periodical payments.

4.2.3.3 New South Wales

Erstwhile provisions for the order of interim awards in terms of both the Supreme Court Act 1970 and the District Court Act 1973 have been repealed with the consequence that the law of New South Wales does not make provision for interim awards.³²²

4.2.3.4 Conclusion

It should be noted that the legislative exceptions to the once-and-for-all principle of damages, as noted from the first two jurisdictions, do not in any way abolish the established

³²⁰ *Assessment of Damages for Personal Injury and Death* 38.

³²¹ *Ibid.* The court in *Revesz* held per Hogarth J that “[a]t the trial counsel for the plaintiff intimated that he now sought a final assessment of damages; and counsel for the defendant did not oppose my making a final assessment. However, I have decided to pronounce a declaratory judgment in favour of the plaintiff, and not to assess his final damages at the present time.”

³²² New South Wales Consolidated Acts. (www.legislation.nsw.gov.au. Last viewed on 05 October 2012 at 13:35).

rule. However, a judicious application of the varied powers in both jurisdictions will result in a fairer assessment of what is essentially a needs-based assessment of damage.

Although the essence of the departing provisions in both Western Australia and South Australia is similar, it cannot be denied that the wider powers of the former's statute make for a more accurate payment of compensation and therefore advance the purpose of compensation generally. Thus, it does not require judicial interpretation to determine that the courts have powers of review and further powers to redeem periodical payment as and when the conditions of the plaintiff change. In essence, one can say that the position in Western Australia is much more flexible and legally desirable for the purpose of 'full compensation'.

4.2.4 Points of departure in medical and related expenses

4.2.4.1 Needs principle

Since the decision in *Griffiths v Kerkemeyer*,³²³ which was premised in the often quoted passage from the English case *Donnelly v Joyce*,³²⁴ the position in medical and related cases has been that recoverable damages constitute a measure of needs that have been created following the commission of a personal injury.³²⁵ The needs created by the personal injury and the subsequent outlay of expenses will only be compensated for if it is shown that the expenses were reasonably incurred.³²⁶ According to *Sherman v Evans*,³²⁷ the touchstone of the reasonableness inquiry is based on a comparison between the expenses incurred and the medical benefits to the plaintiff. The court held in the written opinion of Gibbs and Stephen JJ that:

³²³ (1977) 139 CLR 161.

³²⁴ [1973] 3 All ER 475: "We do not agree with the proposition, inherent in Mr Hamilton's submission, that the plaintiff's claim, in the circumstances such as the present, is properly to be regarded as being, to use his phrase, 'in relation to someone else's loss', merely because someone else has provided to, or for the benefit of, the plaintiff – the injured person – the money, or services valued as money, to provide for *needs* of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's *needs* have been met, the question who paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss ... is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the *need* for those special boots or for the nursing services, the value of which for purposes of damages – for purposes of the ascertainment of the amount of the loss – is the proper and reasonable cost of supplying those *needs*." [Emphasis added].

³²⁵ Luntz *Assessment of Damages for Personal Injury and Death* 248.

³²⁶ *Ibid* 250.

³²⁷ (1977) 138 CLR 563 at 573.

[i]f the cost is very great and the benefits to health slight or speculative the cost-involving treatment will clearly be unreasonable, the more so if there is available an alternative and relatively inexpensive mode of treatment, affording equal or only slightly lesser benefits. When the factors are more evenly balanced no intuitive answer presents itself and the real difficulty of attempting to weigh against each other two incomparables, financial cost against relative benefits to the plaintiff, becomes manifest.

Notwithstanding the clear expression of the above opinion and the absence of any determinative legislative provision in this respect, the law allows the plaintiff the choice between private and public hospital treatment despite the cost of care being known to be different.³²⁸ For purposes of the provision of free medical facilities, the law distinguishes between eligible patients and compensable patients. An eligible patient is referred to in the Australian Health Care Agreements as a person who has received, is receiving or has established a right to receive services for the injury, illness or disease,³²⁹ while a compensable patient is referred to in the Health Insurance Act, 1973 as a person who is receiving or established a right to receive payment by way of compensation or damages in respect of the injury.

4.2.4.2 Application of the needs principle by the courts

In a number of decided cases dealing with the needs principle and the provision of reasonable services to the injured plaintiff, it became necessary to indicate the circumstances under which the provision of past services or the expectation of further services would be compensated for where such services are provided by a relative of the plaintiff whether or not the plaintiff was bound, morally or legally,³³⁰ to make recompense to the said relative.

The classic formulation of the principle in modern Australian law is in the case of *Griffiths v Kerkemeyer*.³³¹ Suffice it to reiterate the apt opinion as expressed in the English case of *Donnelly v Joyce*,³³² in which it was held in the written opinion of Gibbs J that the plaintiff's loss, that is, the need for services, only entitles him to damages if the need thus created is 'productive of financial loss'. The example provided is a case where the need for medical services was met by the state for free, with the consequence that the plaintiff suffers no loss and therefore is not entitled to damages.³³³ Notwithstanding the sound logic of this

³²⁸ Luntz *Assessment of Damages for Personal Injury and Death* 268.

³²⁹ *Ibid* 278.

³³⁰ It should be noted, however, that recovery of any such expenses does not depend on the legal liability of the plaintiff to make good the service provider's loss. See *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 193.

³³¹ (1977) 139 CLR 161.

³³² See par 4.2.4.1 above.

³³³ *Griffiths v Kerkemeyer* (1977) 139 CLR 161, 165.

reasoning, the true position of the law is indicated at 193 in the written opinion of Mason J where His Honour opined:

That view proceeded upon the footing that the relevant loss was the legal liability to pay for the services. It is now recognised that the true loss is the loss of capacity which occasions the need for the services.

The underlying rationale of the opinion of His Honour Mason as expressing the law is further indicated by passages from *Nguyen v Nguyen*,³³⁴ *Van Gervan v Fenton*³³⁵ and *Kars v Kars*.³³⁶ It should be borne in mind that although the needs principle is now part of Australian jurisprudence, the principle is essentially English. Therefore, it is no surprise that the House of Lords in *Hunt v Severs*³³⁷ overturned the *Donnelley v Joyce* judgment by the introduction of the trust system, that is, a system in terms of which the loss of the care provider is held in trust for him by the plaintiff, and that the law in Australia had to reconsider its stance in respect of cases where the wrongdoer in negligence is also the service provider. One has to consider whether the loss can still be held to be the need for the services, irrespective of the identity of the provider of such services.

When faced with such a proposition in *Kars v Kars*,³³⁸ the court was at pains to hold that the needs principle is applicable irrespective. In the written opinions of Toohey, McHugh, Gummow and Kirby JJ, the court held at 382 that:

[t]he result which is reached is not wholly satisfying. But a consideration of the conflicting opinions, judicial and academic, in Australia and England demonstrates why this is so. In the end, a choice must be made as to the least unsatisfactory solution to the problem. The choice which we prefer reduces the anomalies and absurdities. It lays emphasis on the provision for the injured plaintiff's needs which is the foundation of recovery in such a case.

³³⁴ (1990) 169 CLR 245 at 262. In a written opinion of Dawson, Toohey & McHugh JJ, the court held that "... viewed the damages in question as damages for one component of the plaintiff's loss occasioned by his physical disability. The disability gave rise to the need for nursing and other services. ... as the need represented the loss, the value of the services required to fulfil that need served as a means of assessing the loss."

³³⁵ (1992) 175 CLR 327 at 333 where his Honour Mason, in a concurrent opinion with Toohey & McHugh JJ, held that "[c]onsequently, it should now be accepted the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her and that the plaintiff does not have to show, as Gibbs J held, that the need "is or may be productive of financial loss."

³³⁶ (1996) 187 CLR 354 at 360 where his Honour Dawson J held that "[s]ince the acceptance of the rationale in *Donnelly v Joyce* by the court in *Griffiths v Kerkemeyer*, it cannot be said in Australia that the underlying rationale of awarding damages for services provided gratuitously is to enable the carer to receive proper recompense for his or her services. The damages are recoverable to compensate the plaintiff for loss which is evidenced by the need for the services..."

³³⁷ [1994] 2 All ER 350 (HL).

³³⁸ (1996) 187 CLR 354.

It cannot be said that the logic or foundational rationale of withholding the needs principle over and above crediting the wrongdoer service provider with the value of such service is entirely convincing. Suffice it to indicate that while the basis on which the rule that the wrongdoer should not benefit from some gratuitous event or some other event flowing from his negligence is sound, it cannot be emphasised enough that where the wrongdoer wishes to make good his wrong the law should not continue to punish him twice over the same cause. An acknowledgement of the past services by the wrongdoer ought to be made so that the need of the plaintiff, as is law in that land, is provided for by the wrongdoer's provision of service at no additional cost, unless the wrongdoer employs outside help. However, a distinction must be drawn here between His Honour Mason's exposition that the need must be 'productive of financial loss' and the factual reality that the loss so occasioned by the need is in these cases the wrongdoer's loss of the value of the services occasioned by his negligence. It must further be borne in mind that because the law does not require any legal liability to make recompense, nor does it require that the voluntary service provider be bound to continue providing such services going forward, the probability of the discontinuation of the services is one of the contingencies that must be taken into account by the court in determining the future cost of the services and the need thereof.

4.2.4.3 Value of the services

Cases are legion where the service provider leaves gainful employment to provide services to the plaintiff at no cost at all, or even if the parties agree otherwise, the law does not recognise such an agreement as a precondition for the recovery of damages in respect of such services. The question is whether the income of the voluntary service provider is the reasonable value of such services, or whether the standard or market cost of the service is the reasonable value of the service. As the benchmark of cases for the needs principle, the court in *Griffiths v Kerkemeyer*³³⁹ held that the latter is the true value of the service.

In coming to an agreement with this notion, the court in *Van Gervan v Fenton*³⁴⁰ in the written opinion of Mason CJ, Toohey and McHugh JJ advanced the following reasons:

- Fairness to the provider as well as to the plaintiff requires that the plaintiff should have the ability to pay the provider a sum equivalent to what the provider would earn if he or she was supplying those services in the marketplace.
- There exists no binding agreement with the service provider to continue to provide such services.

³³⁹ (1977) 139 CLR 161 at 193.

³⁴⁰ (1992) 175 CLR 327 at 335 - 337.

In the concluding remarks on this subject His Honours held that:

[t]o give the plaintiff damages equivalent to the lost income of the provider of the services when that person has been in employment is to substitute an arbitrary sum for the reasonable value of the services.

The above is an exposition of the needs principle as necessitated by the injury of the plaintiff. However, it still does not indicate the exact damages claimed under medical and related expenses.

4.2.4.4 Statutory regulation of the needs principle

The various jurisdictions in Australia formulated tests and requirements for liability in cases of gratuitous services, and determined the exact scope of the needs principle.

i) Queensland

Section 59 of the Civil Liability Act 2003 provides in subsection 1 that the damages for gratuitous services provided to an injured person are not to be awarded unless the services are necessary and the need for the services arises solely out of the injury in relation to which damages are awarded. Subsection 2 provides that damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty occurred. And in subsection 3 it is provided that in assessing damages for such services, a court must take into account—

- (a) any offsetting benefit the service provider obtains through providing the services; and
- (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution.

This provision not only makes sense of the needs principle but also abolishes the double edged nature of the principle as was previously applied. Thus, the ultimate test is not necessarily the needs of the plaintiff but circumstances giving rise to such a need are of importance too. This position represents a sound position in logic and in law.

ii) New South Wales

The circumstance under which gratuitous services may be compensated for in this jurisdiction is provided for in section 15(2) of the Civil Liability Act 2002 which provides that:

No damages may be awarded to a claimant for gratuitous attended care service unless the court is satisfied that:

- (a) there is (or was) a reasonable need for the services to be provided, and

- (b) the need has arisen (or arose) solely because of the injury to which the damages relate, and
- (c) the services would not be (or would not have been) provided to the claimant but for the injury.

The provision is express in creating a causal nexus between the tort and the subsequent provision of gratuitous care. It cannot be over-emphasised that the provisions of this section are not broad enough to encompass circumstances as highlighted by the similar provisions of Queensland.

iii) Northern Territories

Section 23(1) of the Personal Injuries (Liabilities and Damages) Act 2003 is phrased in the exact words of section 15(2) of the Civil Liability Act 2002 of New South Wales, and therefore the comment above applies here too.

In essence, the clear legal certainty of the provisions of the three (3) legislation is, in the author's opinion, the premise from which the law should proceed in the case of the *Griffiths v Kerkemeyer* damages.

4.3 Recoverable medical and related expenses

4.3.1 Medical expenses

The classic test for the recovery of this expense requires the plaintiff to show that the particular medical expenditure was necessarily or reasonably required as a consequence of the injuries occasioned by the negligence.³⁴¹ It is, however, unclear whether, for purposes of this test, the necessity of the expenditure carries the same meaning as the reasonableness thereof. It follows from conceivable logic that the application of the former requires a subjective inquiry into the extent of the injuries and the medical procedures it calls for, whereas the latter is for all intents and purposes a very objective test for which the application does not rely on the subjective consideration of the plaintiff. It appears unlikely that a case can be made for arguing that the two tests are mutually destructive and/or incapable of finding a similar answer. However, if one considers that the law does not require the successful diagnosis or treatment of the injuries but disallows speculative treatments,³⁴² it therefore becomes clear that the words necessarily or reasonably are used interchangeably and carry a similar meaning.

³⁴¹ Luntz *Assessment of Damages for Personal Injury and Death* 266.

³⁴² Luntz *Assessment of Damages for Personal Injury and Death* 266. At fn 136 the learned author refers to *Neal v CSR Ltd* (1990) Aust Torts Reps (WA FC).

The items of expenditure in respect of medical expenses are held to include the following: physiotherapy, chiropractic treatment, acupuncture, and conveyance by ambulance to hospital; however, the law does not make provision for recovery of fees of a doctor who examines the plaintiff for purposes unrelated to the injuries sustained.³⁴³

4.3.2 Related expenses

There may be various other expenses that do not necessarily impact on the medical needs of the plaintiff but owing to the physical deformities are now needed to be provided for. This may include the following:

Housing

Serious personal injuries may at times necessitate the alteration of the house or the purchase of a new one to accommodate the plaintiff in his/her post-injury physical state. Although it is noted as a general rule, the law does not always require that the expenses of such alterations or purchase be reasonably incurred.³⁴⁴ In line with the judgment in *Sharman v Evans*,³⁴⁵ a comparison between the cost of home care and institutional care depends on the health benefits offered to the plaintiff. However, the ordinary costs of maintaining or running the house are discounted from the damages in respect of this loss.³⁴⁶

Travelling expenses of relatives

In *Wilson v McLeay and Another*,³⁴⁷ in the written opinion of Taylor J the court allowed airplane fares for the plaintiff's parents on the condition that recovery depended on the plaintiff undertaking to reimburse the expenses of these costs to her parents. The claim under this head of loss requires a consideration of the facts and the reasonableness of such steps undertaken by the parties concerned.

Rehabilitation expenses

In terms of section 4 of the Motor Accident Insurance Act 1994, rehabilitation is defined as the use of medical, psychological, physical, social, educational and vocational measures (individually or in combination) —

³⁴³ *Ibid.*

³⁴⁴ Luntz *Assessment of Damages for Personal Injury and Death* 252. See also fn 32 at 253.

³⁴⁵ (1977) 138 CLR 563 at 573.

³⁴⁶ Luntz *Assessment of Damages for Personal Injury and Death* 253.

³⁴⁷ (1961) 106 CLR 523 at 526.

- (a) to restore, as far as reasonably possible, physical or mental functions lost or impaired through personal injury; and
- (b) to optimise, as far as reasonably possible, the quality of life of a person who suffers the loss or impairment of physical or mental functions through personal injury.

The reasonable costs recoverable under this head are legislatively clearly expressed in section 51 of the same Act which reads in part that:

- (1) An insurer may make rehabilitation services available to a claimant on the insurer's own initiative or at the claimant's request.
- (2) An insurer that makes rehabilitation services available to a claimant before admitting or denying liability on the claim must not be taken, for that reason, to have admitted liability.
- (3) Once liability has been admitted on a claim, or the insurer has agreed to fund rehabilitation services without making an admission of liability, the insurer must, at the claimant's request, ensure that reasonable and appropriate rehabilitation services are made available to the claimant.
- (4) If the insurer intends to ask the court to take the cost of rehabilitation services into account in the assessment of damages, the insurer must, before providing the rehabilitation services, give the claimant a written estimate of the cost of the rehabilitation services and a statement explaining how, and to what extent, the assessment of damages is likely to be affected by the provision of the rehabilitation services.
- (5) The claimant may, if not satisfied that the rehabilitation services made available under this section are reasonable and appropriate —
 - (a) apply to the commission to appoint a mediator to help resolve the questions between the claimant and the insurer; or
 - (b) apply to the court to decide what rehabilitation services are, in the circumstances of the case, reasonable and appropriate.
- (6) The insurer must bear (or reimburse) the cost of providing rehabilitation services under this section unless the insurer's liability is reduced —
 - (a) by agreement with the claimant; or
 - (b) by order of the court under subsection (8).
- (7) The insurer may, if of the opinion that the cost of rehabilitation services is unreasonable —
 - (a) apply to the commission to appoint a mediator to help resolve the questions between the claimant and the insurer; or
 - (b) apply to the court to decide what rehabilitation services are, in the circumstances of the case, reasonable and appropriate or to decide to what extent the insurer should contribute to the cost of rehabilitation services.
- (8) On an application under subsection (7)(b), the court may decide the questions raised on the application and make consequential orders and directions.
- (9) The cost to the insurer of providing rehabilitation services under this section is to be taken into account in the assessment of damages on the claim if (and only if) the insurer gave a statement to the claimant, as required under subsection (4), explaining how and to what extent the assessment of damages was likely to be affected by the provision of the rehabilitation services.

This is an insightful piece of legal drafting and sets out in very clear terms the measures necessary for rehabilitation costs, and still keeps in check the traditional catch phrase that the costs must be reasonably incurred.

It must be noted that the fact of the costs being necessary or reasonably incurred does not defer from the fact that the plaintiff must still mitigate the loss so suffered.

4.4 Mitigation of loss

The rule on the mitigation of loss remains unchanged from the laws of both South Africa and England in that it addresses the post-tort state. It therefore suffices to indicate that the plaintiff is required to take all reasonable measures to mitigate the eventual loss flowing from the tort. Stewart and Stuhmcke³⁴⁸ express the view that the policy on mitigation is to ensure that the compensation awarded is reasonable for both parties to the litigation. The position in Australia, however, goes beyond established practice and is actually statutorily enacted in terms of section 54 of the Motor Accident Insurance Act 1994 which provides that:

- (1) If an insurer is not satisfied with the action taken by a claimant to mitigate damages, the insurer may give the claimant written notice suggesting specified action the claimant should take to mitigate damages.
- (2) The notice may, for example, suggest that:
 - a) the claimant should undergo medical treatment of a specified kind; or
 - b) ...
 - c) the claimant should undergo rehabilitation therapy of a specified kind, or undertake specified programmes of rehabilitation and training.
- (3) In assessing damages for personal injury arising out of a motor vehicle, the court must –
 - a) consider whether the claimant has failed to take reasonable steps to mitigate damage by not following suggestions made under this section; and
 - b) if it appears the claimant has failed to take reasonable steps to mitigate damage by not following the suggestions, reduce the claimant's damages to an appropriate extent reflecting the failure.

The express provisions of this section underscore the importance of mitigation in the assessment of damages in cases of medical and related expenses, and further indicate that not every penny expended will be recovered in damages. Subsection 1 brings in a new dimension to the mitigation domain in that it indicates the steps that insurers may take to ensure the reasonableness of the expenses. This offers welcome relief to the burden at trial to prove that the expenses incurred are not reasonable in that the plaintiff failed to mitigate his/her loss. In essence, one may conclude that the insurers' role in litigation extends beyond mere payers of proved liability to actually aiding in the ultimate award of damages.

³⁴⁸ *Australian Principles of Tort Law* 591.

As is noted above, not every penny expended is recoverable in damages, and the plaintiff has to take reasonable steps to mitigate his or her loss. However, it has to be noted that not all the costs of the damage are borne by the tortfeasor as the plaintiff may derive some benefits from sources unrelated to the tort. The following is a segment on the law in Australia with regard to such benefits.

4.5 Collateral source rule

4.5.1 Introduction

It has already been noted that the collateral source rule developed rather casuistically in most common law jurisdictions, and therefore it should come as no surprise that Luntz³⁴⁹ notes that the law in Australia on this subject has been plagued by uncertainty.³⁵⁰ Be that as it may, the author mentions the following policy solutions to the uncertainty of the collateral source rule.³⁵¹

Cumulation

This entails the plaintiff keeping the benefit from the other source and also becoming entitled to the full amount of damages in tort. It is clear that this has the tendency to disregard all other benefits that the tort may visit upon its victim. In effect this is not too far removed from a winner takes all sort of legal stance, which is in no way a better solution to the uncertainty surrounding the rule. Certainty does not necessarily find favour in the application of punitive legal principles. Therefore, cumulation does not offer a practical or sustainable solution to the casuistry of the collateral source rule.

Election

As the name would suggest, this entails the plaintiff having the choice (election) between damages and the collateral benefits. Thus, the acceptance of the one automatically excludes the other. In essence, if the plaintiff was to accept a benefit from a collateral source it would mean that the tortfeasor is no longer liable for his/her negligence. This position cannot be said to be the most welcome way of clarifying the uncertainty surrounding the collateral source rule. The remedy for tort negligence should not involve a choice inherently manifesting from sources external to the tortfeasor.

³⁴⁹ *Assessment of Damages for Personal Injury and Death* 424.

³⁵⁰ See paras 2.6 and 3.4 respectively.

³⁵¹ *Assessment of Damages for Personal Injury and Death* 424 – 427.

Reimbursement

This system operates on the understanding that benefits given to the plaintiff would be reimbursed to the donor out of the damages recovered. It must be noted, though, that the donor is not protected by any statutory mechanism for the recovery of his/her benefits to the plaintiff.

Subrogation

This entails the person or institute from which the benefit emanates being given a right of subrogation or indemnity against the tortfeasor in negligence. Suffice it to indicate that while this is the preferred policy and fundamentally protects the donor, it cannot be argued comprehensively that it is a sound policy. Thus, it has the effect that the plaintiff benefits nothing in that the donor uses his/her position to recover the cost incurred in conferring the 'benefit' in damages. It is therefore the author's opinion that this policy does not provide clarity on the overall uncertainty of the rule, and that in actual fact no benefit is received by the plaintiff but for not dealing directly with the tortfeasor in litigation.

Division

In terms of this policy, damages due to the plaintiff are reduced by the amount of the other benefits and that portion of the loss is left to be borne by the other source. Put into simple layman's language, this means that the liability towards the plaintiff for the tort is divided between donors and the tortfeasor, a solution which cannot be accepted as legally sound. It has to be understood that the purpose of gratuitous care or provision of gratuitous services belies the idea that the care or services should benefit the victim of the negligence based on his/her needs and not ameliorate the liability of the tortfeasor. Thus, if the tortfeasor's liability was to be divided on occasion of some gratuitous help from outside, then the purpose of the care or service would be defeated. As has been emphasised throughout, the principle in medical and related cases is based on the medical needs of the victim of the tort, and not the division of the tortfeasor's liability.

4.5.2 Application of the rule

Trindade and Cane³⁵² note the two classic formulations to the determination of the rule. The authors express the opinion that a distinction ought to be drawn between benefits that reduce the plaintiff's loss and must be set off, and benefits that do not. In ascertaining this,

³⁵² *The Law of Torts in Australia* 532 – 533. See also Stewart & Stuhmcke *Australian Principles of Tort Law* 590 – 591.

three further questions have to be asked; thus, whether or not the benefit was derived directly from the accident, or was it the result of the plaintiff's foresight, or was it derived from some independent source. It therefore has to be ascertained whether the benefit received is a *res inter alios acta*. The secondary inquiry is to establish the intention of the party giving the benefit. However, owing to the difficulty of this test the author suggests that an alternative is to inquire into the purpose of the payment.

Insurance

It has been established since the *Bradburn* case³⁵³ that no deduction is to be made from the damages by reason of benefits that accrue to the plaintiff under an insurance policy.³⁵⁴ Further, it is a firmly entrenched law that such benefits, if received from an indemnity policy, will not amount to a double compensation of the plaintiff because the principle of subrogation is applicable here.³⁵⁵ However, Luntz³⁵⁶ notes that the law is not clear as to whether the principle of non-deductibility of insurance proceeds extends to cases where the premiums are paid by some other person besides the plaintiff.

Gratuitous gifts

It has been established in 4.2.4 above that the provision of services in respect of the *Griffiths v Kerkemeyer* damages depends on the need for such services. Suffice it to state that this point of departure is now statutorily regulated in the various jurisdictions, as discussed above in 4.2.4.4, and it is a clear principle of the law that such receipt of benefits does not affect the assessment of damages unless per statutory limitations.³⁵⁷ In essence, the costs of such service would not be deductible from the amount of damages.

Social security benefits

Section 23(2)(a) of the Disability Act 1986 provides that where:

- (a) a person who is undertaking, or has undertaken, a rehabilitation program recovers or receives compensation from another person; or
- (b) ...

³⁵³ *Bradburn v Great Western Railway Co* (1874).

³⁵⁴ Luntz *Assessment of Damages for Personal Injury and Death* 431.

³⁵⁵ *Ibid.*

³⁵⁶ *Assessment of Damages for Personal Injury and Death* 432.

³⁵⁷ See s 59(1)(c) of the Civil Liability Act 2003, s 15(3) of the Civil Liability Act 2002; and s 23(2) of the Personal Injuries (Liabilities and Damages) Act 2003.

the person who is undertaking, or has undertaken, the rehabilitation program is, subject to subsection (3) and notwithstanding section 22, liable to pay to the Commonwealth an amount equal to the cost of the rehabilitation program.

Thus, the costs of rehabilitative training are to be taken into account in the assessment of the plaintiff's damages and are therefore not deductible.

Despite the fact that clear guidelines exist as to the formulation of the collateral source rule, it is apparent here that the law with regard to its applicability to medical and related expenses is actually less controversial and much more established. Indemnity insurance constitutes *res inter alios acta* even in cases of earning capacity as a head of loss, and there are no special circumstances whereby it should be treated differently here. Further, notwithstanding the statutory exceptions provided by various jurisdictions, the *Griffiths v Kerkemeyer* damages are now established law in Australia for counter arguments for the non-deductibility of gratuitous services provided by third parties or the defendants themselves. In conclusion, the express provisions of section 23(2)(a) of the Disability Act 1986 must also be commended as bringing clarity to an aspect of the law that is often riddled with confusion and uncertainty.

4.6 Conclusion

The Australian law of torts follows pretty much the same path as the English law of torts in that where the entrenched common law principles regarding the assessment of damage and the quantification of damages only broadly regulate the measures taken, the legislator has stepped in to actually contextualise the whole process. Furthermore, age old principles of reasonableness, where medical and related expenses are a head of damage, have been limited to weigh the expenses incurred with the medical benefits derived. In this way, one has to always be conscious of the fact that, despite success of the medical procedure not being a requirement in law, reasonableness presupposes that the procedure must at least in some way be capable of benefiting the injured person medically.

It is clear from case law, since *Griffiths v Kerkemeyer*, that much of the assessment in law depends on what is essentially a needs-based principle. In this way, the dispute and flowery prose of the open-ended principles of law is narrowed down to something that communicates with the particular head of loss. This is a solution worth trying in South African law where medical and related expenses are a head of loss.

Chapter 5: Conclusion and recommendations

5.1 Introduction

This dissertation is aimed at determining the true nature of medical and related expenses as a head of damage(s). The preceding chapters highlighted the following considerations:

- The true nature of medical expenses in light of the fact that infringement of the bodily integrity causes the loss to be suffered. Thus, the primary consideration here is the issue of categorisation of the private law (subjective) rights.
- The open-ended nature of the assessment principles where medical and related expenses are a head of damage. Consideration is given to the object of an award of damages, the reasonableness test and the problem of mitigation in medical cases.
- Inflation as both an economic and legal factor that affects awards for past loss is an important consideration in the law of damages. Thus, in the quantification of loss regard is had to inflation and the casuistic nature of the collateral source rule.
- The inherently unsatisfactory manner of future awards as indicators of humans' lack of prophetic foresight is another important consideration in this dissertation. Statutory provisions are a critical intervention in an attempt to provide certainty of calculation in an area otherwise very contiguous.
- A comparative study is undertaken with a view to determining if any lessons can be learned from the developments and practice in both English and Australian jurisprudence.

In light of the research undertaken in this dissertation, recommendations will be made to address the shortage of theoretical and practical certainty as far as the true nature of medical expenses is concerned and ascertain proper guidelines for the determination of future loss.

5.2 True nature of medical expenses as a head of damage

The point of departure, in cases where medical and related expenses are a head of damage, is that the bodily integrity of the individual is the premise from which one should proceed. Traditionally, this has been accepted as falling swiftly within the ambit of personality rights. With this in mind, and the legitimacy of the characteristics of personality rights being acceptable law, the argument advanced herein is that the nature of medical expenses as a head of loss is fundamentally in conflict with the very content of personality rights.

Whereas, as noted, the right and/or interest guarding the right to personality is inherently non-patrimonial in making, it is accepted here that the right to healthcare, as the right that is ultimately infringed when a delict is committed against any other individual, is and ought to be valued in money. Thus, as much as it is law to not commercialise the bodily integrity of a person, it is impractical to not consider the inherent commercial value of the right to healthcare. It is sound theory that the person of the individual who is visited by a delict cannot be overlooked without the results disappearing too. Thus, for the right to healthcare, inherently patrimonial as it is, to be enforced, a person must have suffered some or other form of infirmity to his/her bodily integrity, which is inherently non-patrimonial. In these instances, it has to be accepted that one damage-causing event is capable of infringing in the main two fundamentally conflicting interests of an individual culminating in loss.

For reasons of sound theory, it cannot be acceptable to simply force conformation with the existing private law (subjective) rights when none extends to cover incidences similarly placed to medical expenses as a head of loss. To do so would deprive the law of most of its substance, and undermine the classification of the existing principles on the nature and content of the private law (subjective) rights. For the reasons herein advanced, it has to be determined if another right is infringed when medical expenses are incurred.

To satisfy this inquiry, it has to be determined if the right so infringed meets the subject-object relationship and the subject-subject relationship test as expressly set out by authors Hosten et al.³⁵⁸ and Du Plessis.³⁵⁹ A further inquiry in this instance relates to requirements for recognition of a private law (subjective) right as set out by authors Neethling, Potgieter and Visser;³⁶⁰ thus, the legal object must be of some use or value, and must have a sufficient measure of distinctiveness, definiteness and independence.

- Subject-object relationship – on the one hand, it is determined in Chapter 2 that the legal subject is the premise from which legal relationships proceed. On the other hand, it is further demonstrated that the object of the right to healthcare, as the right that is ultimately infringed when medical expenses are incurred, is the sound physical and mental wellbeing of the legal subject. In essence, the detrimental consequences to the personality right and/or interest in bodily integrity result in loss of health. As it were, this affects the object of the right to healthcare and affords the legal person certain powers in respect thereto. For instance, the victim may take out insurance as a way of exercising power over the object of the right to healthcare.

³⁵⁸ *Legal Theory* 543 – 544.

³⁵⁹ *Introduction to Law* 140.

³⁶⁰ *Law of Personality* 12.

- Subject-subject relationship – for a right to be effective as a private law (subjective) right there must be a legal duty on third parties to respect the legal subject's powers over the legal object. This right extends to the state in terms of section 27(2) of the Constitution of the Republic of South Africa, 1996.
- Use or value of the legal object – bodily integrity, as an embedded right to personality and as the primary right that has been infringed, has already been established as being of value, and the appreciable value that humans attach to their health indicates the value of the right to healthcare. Medical aid insurance is a clear indication of the value of the healthcare object.
- Sufficient measure of distinctiveness, definiteness and independence – the analysis on this subject reveals the intrinsic link between bodily integrity, an element of personality right, and the object of the healthcare right. Thus, on the one hand, the right and interest in one's sound physical and mental wellbeing presuppose that the personality interests in bodily integrity are intact while, on the other hand, a full complement of the right to bodily integrity requires sound physical and mental wellbeing. Based on this conclusion, one may categorically state that the right to healthcare is a unique right and does not lend itself to clear determination according to existing private law (subjective) rights. Notwithstanding this interconnectedness, however, the healthcare right and personality rights are fundamentally different. The former right is inherently patrimonial, despite the diversity of the subsequent assessment and quantification, while the latter right is non-patrimonial in character.

In the final analysis, it must be noted that the interconnectedness of bodily integrity, a personality right, as the right which is ultimately infringed, and the healthcare right of the holder, inherently patrimonial, cannot be emphasised enough. Thus, the right so infringed is *personal* in that bodily integrity remains an inseparable element of the person of the holder of the right; it is, however, *material property* in that the healthcare right of the holder has financial implications irrespective of the diversity of the subsequent assessment. That is, the patrimony of the holder of the right falls to be diminished by the settlement of medical expenses incurred as a result of the infringement of bodily integrity.

In line with these characteristics, a recommendation is made for the development of a new category of private law (subjective) rights, namely **personal material property rights**.³⁶¹ This category is intended to cover, among other things, instances of medical expenses flowing from personal injury. By recognising this new category of subjective rights, an infringement

³⁶¹ Suggested in passing by Neethling 2005 *CILSA* 210 at 225.

of the right to healthcare can easily be identified as wrongful, and the consequences of such an infringement, namely medical expenses, can be claimed from the wrongdoer as causally connected to the damage-causing event. This explanation places an infringement of bodily integrity and resultant claim for medical expenses on a surer theoretical footing. Personal material property rights place the inherently conflicting non-patrimonial nature of bodily integrity and the patrimonial nature of the healthcare right on a sounder theoretical foundation.

5.3 Open-ended nature of assessment principles

Many of the provisions on the law of damages lend themselves to a wide variety of meanings depending on the circumstances. Notwithstanding the relative obscurity of understanding where medical and related expenses are a head of damage, these provisions have become trite in our law. In this dissertation, the following general assessment criteria were highlighted:

- The general object of an award of damages – it is accepted as trite that the object of an award of damages is to place the claimant in the financial position, to the extent that money can do so, he/she would have been in ‘*but for*’ the delict. Despite the clear terms of this statement, one cannot help but observe the statement in *Geldenhuys v Minister of Safety and Security and Another*³⁶² where the court cited with approval the following reasoning made in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194: “[I]t must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty....”

Thus, it must be accepted here that the general object of an award of damages provides guidelines in the broadest of measures where medical and related expenses are a head of damage(s). This follows from the fact that the ultimate object in this instance is to ensure that the claimant is returned, as far as medical treatment makes it possible, to the pre-accident physical and mental condition.

- The reasonableness of expenses – the established premise of a successful claim for medical and related expenses is that the cost incurred must be reasonably incurred. However, it has to be accepted as trite that this legal phrase is open-ended and that its true meaning lends itself to various possibilities. Very little effort, if any, is made

³⁶² 2002 (4) SA 719 (C) 736C-E.

to ensure that its true meaning is universal to promote homogeneity of its application. A case in point is the conflicting interpretation given to 'reasonable expenses' in *Williams v Oosthuizen*,³⁶³ *Maja v South African Eagle Insurance Co Ltd*³⁶⁴ and *Ngubane v South African Transport Services*.³⁶⁵ Thus, there is no general measure by which it can be said that the test for reasonableness is capable of clear understanding. Not too many sound arguments can be made in favour of advocating the exactness of the reasonableness test. In this light, one can conclude that this is not a satisfactory way of dealing with this matter. Too much is left to the devices of particular presiding officers. However, the inactiveness of litigation on this head of damage probably suggests to many a legal practitioner that its importance is minimal. This may be a misconception on their part, considering the vast amounts of money that could be involved.

It will be interesting to see if much of the debate in this instance will be laid to rest with the adoption into law of the National Health Insurance Bill 2011.³⁶⁶ It would have to be ascertained if its proper application would put to rest the inherently unsatisfactory position of the open-ended nature of the reasonableness test that currently prevails. At face value, the Bill seems to be an endeavour by the legislature of the day to fulfil its section 27(2) of the Constitution duties. Little regard, if any, is had to the assessment of loss and/or the reasonableness of measures taken in the pursuit of enforcing one's right to healthcare. If anything, the Bill concerns itself with ensuring that the state discharges its duty to provide healthcare through the various mechanisms made possible through its provisions.

It has to be noted that there is no attempt, not even in the National Health Insurance Bill, to abolish and/or suppress the option of private care not covered in terms of the NHI for one reason or another. As a result of this, it is therefore logical that the general principles of the law of damages will apply to instances where claimants still take the option of private care. This will no doubt create problems and/or difficulties of application if one has regard to the principle of mitigation of loss and the fact that public care cannot be forced on any person. At the end of the day, when all is said and done, the law requires that claimants in medical and related cases take all reasonable steps to ensure that their pre-accident physical and mental wellbeing is restored. Ultimately, the pressing need for medical care is, as the Australian jurisprudence has come to accept, the health benefits that the claimants get from a particular procedure.

³⁶³ 1981 (4) SA 182 (C).

³⁶⁴ 1990 (2) SA 701 (W).

³⁶⁵ 1991 (1) SA 756 (A).

³⁶⁶ GG 34523 of 12 August 2011.

In essence, one has to commend the legislature for its pro-activeness in wanting to safeguard the section 27 rights. However, its application to real life situations and, in particular, the assessment of medical expenses as a head of loss should not lend itself to difficulties. Thus, the manner in terms of which the costs of private care are to be assessed with a view to reasonableness thereof should have been penned into the provision of the Bill. However, the lack of clarity on the matter of reasonableness should not completely discredit the Bill as an important provision relating to a right of recourse is promulgated to avoid issues of double compensation. In conclusion, it is contended that measures for the determination of reasonableness should be penned into the provisions of the Bill. The ultimate proviso should relate to the ultimate health benefits of the claimant, taking into account the nature and degree of the injuries sustained. In the main, an objective criterion for the determination of the reasonableness test is advocated for.

- Mitigation of loss – it is a general principle of the law of damages that the claimant should not unreasonably burden the defendant's duty to pay damages.³⁶⁷ However, this principle of assessment competes with the primary object of an award of damages for medical and related expenses, which is the optimum medical benefit to the claimant. The task of weighing these competing interests is made difficult by the fact that there is nothing in law to suggest that the claimant should use the cheaper of the available medical procedures.

Having noted this considerable difficulty of law, the final analysis made in this respect is that a decision on the mitigation of loss has to be made cumulatively with the decision on the reasonableness of the expenses incurred.

5.4 Quantification of loss

Important considerations for the quantification of loss include inflation³⁶⁸ and the collateral source rule. The mooted and casuistic manner of the application of these two factors of law was noted above as follows:

- The inflation factor – an analysis of the legal aspects surrounding an award of damages does not expressly reveal whether the *full compensation* principle has a narrow meaning, so that a rand is compensable with a rand irrespective of the time that has lapsed between the date of damage and the date of the award, or whether it has a wider meaning so that a rand is compensable with its value at the time of

³⁶⁷ Potgieter, Steynberg and Floyd *Law of Damages* 295. See also Neethling, Potgieter and Visser *Delict* 233 and Loubser et al. *The Law of Delict in South Africa* 402.

³⁶⁸ An economic phenomenon that leads to a sustained rise in the general level of prices or that causes a sustained depreciation in the value of money – Delpont 1982 *MBL* 115.

the award. Initially in *Everson v Allianz Insurance Co Ltd*,³⁶⁹ inflation as a legal factor was considered in damages so that the wider meaning of full compensation was adopted. However, the decision was overturned in *SA Eagle Insurance Co Ltd v Hartley*³⁷⁰ with the result that the narrow meaning was given to the full compensation principle. Thus, as it stands, no regard is had to past loss or damage and the impact that inflation may have on the value of this loss, and much guesswork is the order of the day when it comes to future loss. The situation is not made much easier in that judgments on this matter are few and far between because agreements are, almost as a norm in all cases, reached before court. It must be emphasised that the object of an award of damages is to ensure that the claimant is placed in the same position he/she would have occupied *but for* the damage-causing event. Thus, all attempts should be made to ensure the fullest possible compensation. It has to be brought to the attention of litigators that awards of damages are not directed at ensuring that the loss of income or earning capacity and loss of support are stretched to ensure maximum payment. In essence, it must be noted that the law should not lend itself to the litigation of heads with the most money but rather confine itself to the object of fully compensating claimants for all heads of loss. As a result thereof, medical expenses as a head of loss cannot and ought not to be relegated to the 'grandstand' of litigation because it usually has the lowest figures of all the other heads of damage. An argument can be made here that these 'settlements' on the steps of the courts are made in an effort to save the court some valuable time, which indeed is of the essence given the backlog of litigation. Notwithstanding the merit of this argument, however, it cannot be said to be sufficient evidence to simply hand in medical vouchers as proof of payment and to rely on the somewhat bad language of section 17(4) of the Road Accident Fund Act 1996 in cases of personal injuries induced by road accident. This relative downplaying of medical and related expenses as a head of damage means, in the main, that claimants' interests in respect of full compensation are disregarded.

In conclusion, it is worth noting that currency nominalism presupposes a stable economy, and current events suggest that this is an untenable position in reality. Therefore, efforts ought to be made to ensure that past loss is not dismissed as a mere nuisance in litigation and to ensure that every rand reasonably expended is fully compensated. It would be bereft of wisdom to suggest here that the English approach of simple interest, as set out in Chapter 3, does not offer a practical solution to the inflation factor that may possibly visit loss on past damage. For this reason, it is recommended here that the legislature take the necessary

³⁶⁹ 1989 (2) SA 173 (C).

³⁷⁰ 1990 (4) SA 833 (A).

steps to ensure that some sort of interest is penned into statutes to ensure that past loss is fully accounted for where reasonable steps are taken. A case-by-case application of this matter will lead to discrepancies that may be difficult to arrest, and therefore the legislature is best placed to resolve this matter for application by the courts.

- Collateral source rule - the law has not always been clear on the determination of the application of the collateral source rule. In essence, there are no general principles that determine whether a benefit is deductible or not. In the final analysis, it has been noted for some time now that the rule developed casuistically and continues to be applied in this way. One thing that is certain, though, is that the law has developed entrenched practices regarding what is deductible and what is not. In light of these entrenched practices, the collateral source rule requires a consistent application by the courts and no new illogical additions should be made.

In conclusion, it is the author's submission that it is undesirable to define clear rules regarding the application of the collateral source rule. Any attempt to do so would result in the law depriving itself of much of the flexibility in this area of the law of damages.

5.5 Future medical and related expenses

It is demonstrated throughout that without prophetic foresight by humans, the common law has yielded unsatisfactory results in the assessment of future loss. All attempts to assess future loss using the scientific work of actuaries has produced what all have accepted as a guesswork response to awards. In essence, the law has resigned itself to the idea that with the passage of time awards may prove to be either too little or too much, and all would agree that this is an unsatisfactory parting principle for the law to adopt. With this in mind, the legislature took the initiative to ensure that the law allows itself to award the fullest possible compensation. It has to be accepted that perfect compensation is impossible for future loss and no attempts may practically be made to attain it. However, efforts made may result in what all will agree are practical attempts at legally sound solutions.

- Section 17(4)(a) of the Road Accident Fund Act, 1996 goes a long way towards ameliorating the harsh effects of the guesswork nature of future loss by making provision for an undertaking. However, it is noted herein that the section is not a model of good draughtsmanship, and its application by the Fund is not without difficulty. If the culture of regurgitating the provisions of the section in undertakings was brought to a complete halt and proper benefits included in the undertaking, its application would herald an era of certainty of awards never before witnessed in cases of future loss. However, the contention made in this dissertation is that the

section and its subsequent application, innovative as it ought to have been, creates difficulties in understanding.

For the ease of application of this section, it is recommended that the Fund apply its mind to the use of the undertaking. Reasonable costs of administration will be saved if the probable future treatment in terms of the undertaking were made injury-specific. In this way, it is contended that the Fund will in no way be prejudiced, and if anything the certainty of the application of the undertaking will benefit it greatly in respect of the cost of administration. On the other hand, the claimants would have the peace of mind as to the exact nature of treatment that is covered and will not risk any hustle with the undertakings department of the Fund. Certainty in this case not only requires that no party should benefit unfairly over another, but also that the claimants should not be burdened with an extra responsibility of proving their loss and its relation to the road accident every time they claim their costs in terms of the undertaking from the Fund. The application of injury-specific undertakings, the author submits, will greatly benefit both the Fund and the claimants in a manner not unrelated. On the one hand, the Fund will secure for itself the ease and pleasure of knowledge of what treatment respective claimants will incur and therefore best adjust their finances, and the claimants, on the other hand, will be relieved of the burden of risk taking when the need for treatment arises. This is both practical and probable without much difficulty.

- Another endeavour by the legislature to secure certainty of calculation is through the Road Accident Benefit Scheme Bill, 2003.³⁷¹ It is submitted that sections 31 and 34 of the Bill will go a long way in the determination of certainty in that, on the one hand, section 31 expressly indicates the necessary healthcare services that would follow on from personal injuries, while section 34, on the other hand, sets out a clear and individualised rehabilitation plan to ensure that the claimants in personal injury cases are returned, as far as is possible, to the condition they enjoyed prior to the accident.

In the final analysis, the author notes that the Bill will bring welcome relief to the calculation of medical and related expenses as a head of damage.

However, it must be noted that personal injuries are not the sole preserve of road accidents and therefore other delicts may visit some harm to the person of the claimant. As a result of this, the law should be as expansive as possible when dealing with the matter of personal injuries. This, regrettably, is not the position in our jurisprudence in that there is not much

³⁷¹ GG 36138 of 8 February 2013.

said on personal injuries visited by some form of delict or another which bears no nexus to a road accident. This leaves the only probable manner of calculation of future loss as the guesswork framework that currently exists in all of our present law.

If one considers that medical inflation runs at a rate higher than the consumer price index (CPI)³⁷² and therefore one has to contend with a prediction into the future that does not take this factor into account, the logical conclusion reached here is that awards are inherently incapable of full compensation in cases of future medical and related expenses. This does not necessarily follow on from the human lack of prophetic foresight but from the fact that the assessment itself is inherently flawed as a premise from which the guesswork framework proceeds. In essence, if one takes an accepted notion of fault and uses that to come to a figure that talks to CPI in an effort to compensate for future medical loss, the result is bound to be wrong. To this end, one has to accept that periodical payments will no doubt provide the clearest of clear solutions in cases of probable future medical expenses. As it is, current law on the assessment of this head of loss is determined by the value of the service as at the time of determination by the court, and therefore no amount will best fully compensate the claimant than the amount of the value of the service as at the time of treatment. The level of treatment and the proximity in time of each treatment will be an important factor in levying the amounts periodically. For these reasons, it will call upon the courts to apply their mind correctly to issues of periodical payments.

Arguments against periodical payments encountered everywhere in the law of damages range from this solution of not advancing finality of cases in individual matters to subjecting the privacy of claimants to encroachment. In England the Law Commission even noted that claimants themselves prefer the lump sum award assessed at once. However, it has to be borne in mind that justice does not necessarily depend on the preference of people but rather on ensuring that sound, logical, practical and legal conclusions are reached on matters before court. On the one hand, justice may indeed require that matters before court be finalised once and for all. On the other hand, however, justice certainly requires that simple justice be carried out between parties to litigation. It is submitted that in this instance the need for simple justice between litigants outweighs the need for finality of cases, and therefore provisions should be made in our law for the award of compensation in periodical payments.

To further establish sound points of departure in the calculation of future loss, the following recommendations are made:

³⁷² See Klopper *Third Party Compensation* 169.

- A general contingency figure must be made for the possibility of early death. It is suggested here that the legislature adopt decisive measures to ensure that they inform application of the law by the respective courts. However, a further point is made that the cluster of injuries should be grouped together to avoid any oppressive figures that may not speak to the facts of a person's injury.
- A general contingency figure must be made for the possibility of being infected with the HIV/AIDS virus. This figure will vary annually depending on the available statistics at the time of settlement and/or judgment. In this way, any progress in the fight against the virus is accounted for in the ultimate compensation under this head.

5.6 Comparative law

5.6.1 England

An important exception in English law is that the doctrine and recognition of personality rights are non-existent. Thus, no lessons may be derived from English law in as far as the true nature of medical expenses is concerned. However, there are various valuable lessons that a South African legal scholar can derive from English jurisprudence. Despite the strikingly corresponding general principles of the laws of the two countries, the following have been found to be necessary lessons:

- Section 2(4) of the Law Reform (Personal Injuries) Act, 1948 plays a pivotal role in the determination of the reasonableness of steps taken in incurring the expenses. Despite the implicit risk of double compensation inherent in the provision of this section, it offers welcome relief to the determination of the open-ended nature of the reasonableness of expenses test.
- Section 35A of the Senior Court Act 1981 makes provision for simple interest to be awarded for past loss. This section takes account of the ravages of inflation on awards and is too important a consideration to simply ignore. The legislature has to be commended for not being oblivious to the practical legal and economic fact that the passage of time may result in loss of value of the currency and that this indeed affects the claimant's award. Thus, full compensation in this instance requires this sort of legal pro-activeness.
- Section 100 of the Courts Act 2003 makes provision for periodical awards. This section plays an important role in the determination of future awards. The English legislature could not simply resign itself to the guesswork framework of either the conventional method of calculation or the scientific calculation in terms of the

Ogden Tables. This is a welcome relief to an area of the law that over the years has admittedly produced unsatisfactory results. Foresight is an element humans are yet to develop; however, this should not result in prejudice to the parties before court.

In a nutshell, one thing a South African scholar can derive from the English law of damages is that the legislature there is always trying to find ways to counter human weakness or vagueness of general principles of the law of damages.

5.6.2 Australia

As with England, Australian law does not recognise a doctrine of personality rights. This in effect means that there can be no lessons derived from Australian jurisprudence in as far as the true nature of medical expenses is concerned. Notwithstanding this, however, the following valuable lessons can be learned:

- Various jurisdictions have promulgated legislation to counter the inherent unsatisfactory results of forecasting loss. In Western Australia, section 16 of the Motor Vehicle (Third Party Insurance) Act 1943 makes provision for periodical payments of damages, while in South Australia section 30B of the Supreme Court Act 1935 provides for interim payments of awards.

However, probably the greatest lesson one can derive from Australian jurisprudence in as far as the assessment and quantification of medical and related expenses are concerned relates to the *Griffiths v Kerkemeyer* damages. The premise of the *Griffiths v Kerkemeyer* damages is that the position in medical and related cases has been that recoverable damages constitute a measure of needs that have been created following a personal injury.³⁷³ This measure of damages best illustrates the argument advanced in Chapter 2 that the ultimate award in medical and related expenses should relate to optimum medical benefit to the claimant. The touchstone of this test is best set out in *Sherman v Evans*³⁷⁴ where the court held in essence that “[i]f the cost is very great and the benefits to health slight or speculative, the cost-involving treatment will clearly be unreasonable....”

- The application of this primary principle in damages for medical and related expenses has been consistent, as demonstrated by the following case law: *Nguyen v Nguyen*,³⁷⁵ *Van Gervan v Fenton*³⁷⁶ and *Kars v Kars*.³⁷⁷ Despite the consistent

³⁷³ Luntz *Assessment of Damages for Personal Injury and Death* 248.

³⁷⁴ (1977) 138 CLR 563.

³⁷⁵ (1990) 169 CLR 245 at 262. In a written opinion of Dawson, Toohey & McHugh JJ, the court held that “... viewed the damages in question as damages for one component of the plaintiff’s loss occasioned by his physical disability. The disability gave rise to the need for nursing and other services. ... as the need

manner of application of this principle, the legislatures in the various jurisdictions have promulgated provisions for an even sounder determination of the rule. In New South Wales section 15 of the Civil Liability Act 2002, in Queensland section 59 of the Civil Liability Act, and in Northern Territories section 25 of the Personal Injuries (Liabilities and Damages) Act 2003 have all been promulgated with an aim of including in statutes the *Griffiths v Kerkemeyer* damages to ensure uniform application in the respective jurisdictions.

The needs principle of Australian jurisprudence is an important test in medical and related expenses as it goes to address this head specifically and not some open-ended principle of law intended to cover all of the law of damages. In the final analysis, it is contended that the South African law on damages, specifically medical and related expenses as a head of damages, can benefit greatly from this Australian lesson.

5.7 Recommendations

The final recommendations made in this dissertation are the following:

- A new category of private law (subjective) rights ought to be recognised to meet medical and related expenses as a head that infringes both the non-patrimonial personality rights of the claimant and the inherently patrimonial right to healthcare. It is suggested that this new category of rights be **personal material property rights**.
- The test for reasonableness must be clearly set out as an objective test that takes the totality of the facts into account.
- Currency nominalism as a principle of law is inherently unjust and therefore has to be done away with. Inflation has to be acknowledged as both an economic and legal factor. It is recommended here that the pro-activeness of the English legislature be followed so as to pen into statute a provision for the granting of simple interest on damages to counter the effects of inflation.

represented the loss, the value of the services required to fulfil that need served as a means of assessing the loss.”

³⁷⁶ (1992) 175 CLR 327 at 333 where his Honour Mason, in a concurrent opinion with Toohey & McHugh JJ, held that “[c]onsequently, it should now be accepted the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her and that the plaintiff does not have to show, as Gibbs J held, that the need “is or may be productive of financial loss.”

³⁷⁷ (1996) 187 CLR 354 at 360 where his Honour Dawson J held that “[s]ince the acceptance of the rationale in *Donnelly v Joyce* by the court in *Griffiths v Kerkemeyer*, it cannot be said in Australia that the underlying rationale of awarding damages for services provided gratuitously is to enable the carer to receive proper recompense for his or her services. The damages are recoverable to compensate the plaintiff for loss which is evidenced by the need for the services...”

- The undertakings in terms of the Road Accident Fund Act 56 of 1996 have to be injury-specific to avoid burdening the claimants with continuous proof of damages and sequence thereof.
- The Road Accident Benefit Scheme Bill 2013 is an important consideration for medical and related expenses as a head of damage, and the provision of sections 31 and 34 should be promulgated into statute even in the event of the proposed no-fault legislation failing.
- The legislature is called upon to follow the examples of the English and Australian legislatures in an attempt to counter the effect of forecasting loss. Periodical payments are recommended as an appropriate alternative to the lump sum awards that currently prevail.
- In the final analysis, it is recommended that the more practical approach to assessment and quantification of loss of the Australian jurisprudence in medical and related expenses be followed. This measure of loss treats people not merely as part of an exercise in the application of damages, but rather takes account of the injuries sustained and the measures taken to restore people's health. That, it is submitted, is a more personal way of dealing with the law, and is both sound and practical.

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